

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	
)	
Application for Certification)	Docket No.
for the Morro Bay Power Plant)	00-AFC-12
Project)	
_____)	

1055 MORRO AVENUE
MORRO BAY, CALIFORNIA

TUESDAY, FEBRUARY 5, 2002

1:20 p.m.

Reported by:
James A. Ramos
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Michal Moore, Commissioner, Presiding Member

HEARING OFFICER AND ADVISORS PRESENT

Gary Fay, Hearing Officer

Terry O'Brien, Adviser to Chairman Keese

STAFF AND CONSULTANTS PRESENT

Caryn Holmes, Staff Counsel

Kae C. Lewis, Project Manager

Dorothy Torres

Gary Reinoehl

APPLICANT

Christopher T. Ellison, Attorney
Ellison, Schneider and Harris

Andrew L. Trump, Director of Business Development
Western Region

Robert E. Cochran, II, Project Manager
Duke Energy North America

Peter Okurowski, Senior Associate
California Environmental Associates

Robert C. Mason, Vice President
TRC Customer-Focused Solutions

E.G. Daves Rossell
Savannah College of Arts and Design

John W. Parker
Parker & Associates

Eric Walther, Vice President
TRC Customer-Focused Solutions

Gary S. Rubenstein
Sierra Research

INTERVENORS

Robert Schultz, City Attorney
City of Morro Bay

Henriette Groot, President
Bonita L. Churney, Attorney
Pamela Soderbeck
Coastal Alliance on Plant Expansion

Patti Dunton, Native American Consultant
Bonnie Pierce, Salinan Tribal Council
Representative
Tracey Dunton
Roxann Souza
Salinan Tribe of Monterey and San Luis Obispo
County

Clay Singer
C.A. Singer and Associates

John Burch

ALSO PRESENT

Rob Wood
Native American Heritage Commission

Mark Vigil, Sr., Chief
Tarren Collins, Attorney
San Luis Obispo County Chumash Council

David Nelson

I N D E X

	Page
Proceedings	1
Opening Remarks	1
Topics	4
Cultural Resources	4
Applicant witnesses R. Mason, D. Rossell, John Parker, R. Cochran	4
Direct Examination by Mr. Ellison	4
Exhibits	8/39
Questions by Committee	40, 48, 60
Cross-Examination by Ms. Dunton	45, 49
Redirect Examination by Mr. Ellison	58
CEC Staff witnesses R. Wood, D. Torres, G. Reinoehl	66
Exhibits	66/94
Direct Examination by Ms. Holmes	69
Cross-Examination by Mr. Ellison	95
Cross-Examination by Mr. Schultz	108
Cross-Examination by Ms. Churney	110
Cross-Examination by Ms. Dunton	111
Redirect Examination by Ms. Holmes	116
Intervenor SLOCCC witnesses C. Singer and J. Burch	117
Exhibit 141	37, 118/125
Exhibit 142	37, 125/134
Direct Examination by Ms. Dunton	118
Questions by Committee	134
Evening Session	137
Topics - resumed	
Cultural Resources - resumed	137
Public Comment	137
Tarren Collins, Attorney	
San Luis Obispo County Chumash Council	137

I N D E X

	Page
Topics - continued	
Cultural Resources - continued	
Public Comment - continued	
Mark Vigil, Chief San Luis Obispo County Chumash Council	144
Tracey Dunton	145
Roxann Souza	146
Bonnie Pierce, Salinan Tribal Council	148
David Nelson	151
Air Quality and Public Health	154
Applicant witnesses G. Rubenstein and E. Walther	154
Direct Examination by Mr. Ellison	155/171
Exhibits	155,172/197
Cross-Examination by Mr. Schultz	200
Cross-Examination by Ms. Churney and Ms. Soderbeck	201 214
Adjournment	241
Reporter's Certificate	242

1 P R O C E E D I N G S

2 1:20 p.m.

3 HEARING OFFICER FAY: Good afternoon.

4 This is the continuation of the evidentiary
5 hearings in the Morro Bay Power Plant case and
6 we'll go on the record.

7 Welcome you all here today. We will be
8 taking evidence on cultural resources. And then
9 we'll take a dinner break and begin at 6:00 p.m.
10 taking evidence on air quality. Even if we finish
11 cultural early we will not begin air quality until
12 6:00 p.m. as we committed to the parties.

13 Air quality and public health will be
14 taken as a group together. They're so
15 interrelated that we will put the witnesses on as
16 a panel for each of the parties. The applicant
17 will have air quality and public health witnesses
18 together at the table, as will the staff and the
19 intervenors.

20 And we will continue with air quality
21 and public health after we conclude tonight, and
22 start again at 9:00 tomorrow morning on that
23 topic.

24 Any questions or preliminary matters
25 before we start? There is an agenda in back, it's

1 called attachment A, and that might help you.

2 Yes, sir? You're having trouble
3 hearing?

4 AUDIENCE SPEAKER: A little bit.

5 (Pause.)

6 HEARING OFFICER FAY: Can you hear me
7 better now?

8 AUDIENCE SPEAKER: Thank you.

9 MS. HOLMES: Hearing Officer Fay, I have
10 one comment and that's pursuant to our
11 conversation last week. The District witnesses
12 and the staff witnesses will be available
13 beginning tomorrow morning. In other words, they
14 won't be testifying tonight even should the
15 applicant's witnesses finish.

16 HEARING OFFICER FAY: Okay, fine, thank
17 you for reminding us of that. A question came up
18 earlier regarding the hearing order, and I'd just
19 remind people that the Committee issued from the
20 bench last week the directions for the briefs from
21 these hearings on the date the briefs were due.
22 And that will not change. The hearing order will
23 reference it, but you have your directions already
24 based on what we said last week on the filing
25 dates for those briefs.

1 There's also a sign-in sheet in back.

2 The Public Adviser cannot be here during this set
3 of hearings. And so if there's any party that
4 does need some help, please indicate that.

5 I know Ms. Dunton -- is she here? Yes.
6 If you need some guidance or help just ask, feel
7 free to ask questions and I'll try to help you.
8 And then any members of the public, there's blue
9 cards in back you can fill out or comment sheets.
10 If you don't want to speak you can fill out a
11 comment sheet, and be sure it gets turned in to
12 me.

13 If you do want to speak, please, during
14 the break bring up the blue cards, and I'll
15 accumulate those. The way we do comments is we
16 take the comments at the end of each subject area.
17 For instance, if you have comments to make about
18 cultural resources, the time to make those would
19 be when we finish taking evidence on cultural
20 resources. If you have comments to make about air
21 quality, you'd want to wait until we finish air
22 quality to make the comments on that topic.

23 That makes it a little easier for
24 everybody. You can come for the purpose of making
25 your comment at the time that we've actually

1 discussed the topic.

2 Any other preliminary matters then
3 before we begin? All right.

4 We'll turn to the applicant and ask for
5 their presentation on cultural resources.

6 MR. ELLISON: Thank you. I think we
7 need the witnesses to be sworn.

8 HEARING OFFICER FAY: Please swear the
9 witnesses.
10 Whereupon,

11 ROBERT MASON, E.G.DAVES ROSSELL,
12 JOHN PARKER and ROBERT COCHRAN
13 were called as witnesses herein, and after first
14 having been duly sworn, were examined and
15 testified as follows:

16 MR. ELLISON: As you can see, we have a
17 panel of witnesses. The lead witness is Mr.
18 Robert Mason.

19 DIRECT EXAMINATION

20 BY MR. ELLISON:

21 Q I'd like each of the witnesses to state
22 and spell their name for the record.

23 MR. MASON: Robert Mason, M-a-s-o-n.
24 I'm the Project Director for TRC in preparation of
25 the application for certification.

1 DR. ROSSELL: E.G. Daves Rossell.

2 That's D-a-v-e-s, last name R-o-s-s-e-l-l. I'm an
3 architectural historian, did the historic property
4 evaluation.

5 DR. PARKER: John Weldon Parker,
6 P-a-r-k-e-r. Project Archeologist.

7 MR. COCHRAN: Robert Cochran,
8 C-o-c-h-r-a-n. Duke's On-Site Project Manager.

9 MR. ELLISON: I'll address my questions
10 to Mr. Mason, who will answer on behalf of the
11 panel, except as appropriate.

12 Mr. Mason, do you have the cultural
13 resources portion of exhibit 134, commencing at
14 page 88, before you?

15 MR. MASON: Yes, I do.

16 MR. ELLISON: That testimony includes a
17 summary of the qualifications of yourself, Dr.
18 Parker, Dr. Rossell, as well as an appendix with
19 r,sum,s of those individuals, does it not?

20 MR. MASON: Yes, it does.

21 MR. ELLISON: And Mr. Cochran's r,sum
22 and qualifications have been included earlier in
23 this proceeding, in prior testimony.

24 I'd like each of you to briefly
25 summarize your qualifications with respect to

1 cultural resources.

2 MR. MASON: Yes, again my name is Robert
3 Mason. I hold a bachelors and a masters in urban
4 regional studies from USC. Been involved in
5 preparing environmental documents including
6 environmental impact reports and environmental
7 impact statements and applications for
8 certification for industrial projects and energy
9 projects over the last 22 years.

10 In that capacity I oversee and direct
11 multidisciplinary staffs in conducting various
12 analyses including cultural resources. And I have
13 overseen the preparation of the section and the
14 consultants that have been working on this
15 project.

16 DR. PARKER: I'm John Parker. I hold a
17 bachelors degree from Sonoma State University in
18 anthropology; a masters degree from University of
19 California at Davis in anthropology; a PhD in
20 archeology from UCLA.

21 I've been a registered professional
22 archeologist since 1985. During my past 30 years
23 I've worked in various capacities as a
24 professional archeologist doing cultural resource
25 management work for various state, federal and

1 local agencies, as well as private entities.

2 I've worked in all regions in
3 California, directed more than 150 excavations;
4 worked on close to 300 archeological excavation
5 projects. Nominated 40 archeological sites to the
6 National Register of Historic Places, and was able
7 to obtain appropriations totaling \$4 million for
8 the purchase and preservation of those sites as
9 new state parks in the State of California.

10 DR. ROSSELL: My name is Daves Rossell.
11 I hold a bachelors degree -- degrees in history
12 and architecture, as well as a PhD in
13 architectural history from the University of
14 California Berkeley.

15 I'm currently a professor of
16 architectural history at the California College of
17 Art and at the Savannah College of Art and Design.
18 I've presented papers and published extensively on
19 aspects of electrical history, as well as
20 architecture and engineering of the 19th and 20th
21 centuries.

22 I've also worked extensively in
23 architectural assessment for historic structure
24 reports, notice and summaries of actions, et
25 cetera.

1 MR. ELLISON: Mr. Mason, again on behalf
2 of the panel, was this testimony, that is the
3 cultural resources portion of exhibit 134,
4 prepared by you or at your direction?

5 MR. MASON: Yes, it was.

6 MR. ELLISON: Are there any corrections,
7 additions or clarifications you'd like to make to
8 the prefiled testimony?

9 MR. MASON: Yes, I have several. I'll
10 go through each one. Starting on page 88 of the
11 testimony under the qualification of Dr. Rossell,
12 the third line reads currently, a professor of
13 architectural history at the California College of
14 Art and Design; that should be at the Savannah
15 College of Art and Design.

16 On page 89, and several of these are
17 more format than anything else, but I'll go
18 through them anyway.

19 On page 89 the heading that's entitled
20 summary, there's a letter "f" in front of that.
21 That "f" should be deleted.

22 Right under that discussion of the
23 summary where it talks about the California Energy
24 Commission's final staff assessment relating for
25 cultural resources; that should be regarding

1 cultural resources.

2 Also on page 89 the third paragraph that
3 begins with, the FSA finds that there are three
4 prehistoric sites. About the fifth line down it
5 talks about the California Register of Historic
6 Places; that should be California Register of
7 Historic Resources.

8 On page 94, under the heading down at
9 the bottom of the page, Camp San Luis Obispo
10 offsite construction laydown area, there is a
11 letter "g" in that heading out in front. That
12 should be deleted.

13 On page 95, under the heading Quintana
14 Road offsite construction parking area, the letter
15 "h" should be deleted.

16 On page 98, again the heading Quintana
17 Road offsite construction parking area, the letter
18 "i" should be deleted.

19 On page 100, project impacts, the letter
20 "j" -- again this is in the heading -- the letter
21 "j" should be deleted.

22 On page 101, the last bullet on that
23 page speaks about that Duke will place a cultural
24 resource easement over a cultural resource site at
25 MBPP. To clarify that it should say Duke will

1 place a cultural resource easement over one of the
2 cultural resource sites at MBPP.

3 HEARING OFFICER FAY: Mr. Mason, is that
4 the last bullet on page 101?

5 MR. MASON: It's the last bullet on my
6 page 101. I suppose that people may have -- it
7 begins with, upon receipt of all permits and
8 leases.

9 HEARING OFFICER FAY: Okay. Could you
10 state that correction again?

11 MR. MASON: Okay. It should read, Duke
12 will place a cultural resource easement over one
13 of the known cultural resource sites at MBPP.

14 On page 104, the heading for Quintana
15 Road offsite construction parking area, delete the
16 letter "k".

17 On page 109, under CULTURAL-12, there is
18 a subsection called protocol. And it's B,
19 original or originally quality copies, rather than
20 B, that is the letter C.

21 On page 112, there were some paragraphs
22 that got misnumbered. There's a paragraph number
23 4, that should be paragraph number 3. There's a
24 paragraph number 5 that should be number 4. And
25 on page 113 there's a paragraph 6; that should be

1 number 5.

2 And then one additional clarification,
3 again still on page 113 of the copy of the
4 testimony that I have, in regards to there's a
5 subheading that's called B-3, existing
6 subparagraph B-3, to be renumbered B-4. Just to
7 get you into the area.

8 The last line of that clarification
9 right now it reads, under no dot-dot-dot direction
10 of the CRS or CRM. That should read under -- I'll
11 just read the portion that's -- direction of the
12 project construction manager in coordination with
13 the CRS or a CRM.

14 Those are my changes.

15 MR. ELLISON: Mr. Mason, on behalf of
16 the panel, with those changes are the facts
17 contained in this testimony true to the best of
18 your knowledge?

19 MR. MASON: Yes, they are.

20 MR. ELLISON: And are the opinions
21 contained therein your own?

22 MR. MASON: Yes, they are.

23 MR. ELLISON: And do you adopt this as
24 your testimony on cultural resources in this
25 proceeding?

1 MR. MASON: Yes, I do.

2 MR. ELLISON: Mr. Mason, would you
3 briefly summarize how you went about analyzing the
4 cultural resource impacts of the Morro Bay
5 modernization project?

6 MR. MASON: On cultural resource, both
7 for prehistoric and archeology, and for historic
8 resources we conducted literature reviews,
9 literature searches of existing documentation. We
10 reviewed existing reports that had been prepared
11 for other projects at the Morro Bay Power Plant
12 over time.

13 We conducted surface surveys on the
14 project site, and in the surrounding area. We
15 also then, on the prehistoric side, monitored
16 during geotechnical borings investigations that
17 were conducted within the project site. That
18 monitoring was conducted by an archeologist and a
19 geoarcheologist.

20 We also then conducted a focused
21 subsurface testing program overseen by the
22 archeologist and geoarcheologist of a specific
23 location of interest.

24 MR. ELLISON: Based on that analysis
25 what was your conclusion with respect to whether

1 the project would cause a significant adverse
2 environmental impact within the meaning of the
3 California Environmental Quality Act?

4 MR. MASON: We evaluated the information
5 collected in the analysis in terms of the various
6 California Environmental Quality Act significance
7 criteria and thresholds for cultural resources,
8 including archeology and historic resources, and
9 determined that with the implementation of
10 mitigations or conditions of certification that
11 the impacts could be mitigated to a level of less
12 than significance.

13 MR. ELLISON: What was your conclusion
14 with regard to the compliance of the project with
15 applicable laws, ordinances, regulations and
16 standards pertaining to cultural resources?

17 MR. MASON: We determined through the
18 analysis and through the implementation of the
19 conditions of certification that the project would
20 comply with all applicable LORS.

21 MR. ELLISON: Have you had an
22 opportunity to review the cultural resources
23 section of the final staff assessment?

24 MR. MASON: Yes, I have.

25 MR. ELLISON: What is your conclusion

1 with regard to -- well, let me strike that.

2 Do you agree or disagree with the
3 staff's conclusions regarding significance of
4 environmental impacts and compliance with LORS?

5 MR. MASON: We agree with the staff.

6 MR. ELLISON: Have you also had an
7 opportunity to review the staff's proposed
8 conditions of certification?

9 MR. MASON: Yes, I have.

10 MR. ELLISON: Could you comment upon
11 Duke's agreement or disagreement with those
12 conditions?

13 MR. MASON: We generally agree with all
14 conditions as proposed by staff. We do have some
15 modifications and clarifications that are in our
16 testimony and that I could also go over at this
17 time.

18 MR. ELLISON: Please do.

19 MR. MASON: Primarily what we'll see as
20 I go through, and I'll try to make this as brief
21 as possible, is while we agree in principle and
22 find that the conditions are acceptable, we are
23 looking for some modification regarding the timing
24 and the implementation of the various measures.

25 Beginning with CULTURAL-1, we would --

1 in the first sentence of the condition, itself, we
2 would like to insert, currently the condition as
3 in the FSA reads, prior to the start of ground
4 disturbance. We would like to clarify that to
5 say, prior to the start of native soil ground
6 disturbance.

7 That change we have on several of these,
8 and I will go over it once in terms of our
9 rationale for that, and then won't have to redo
10 that for each of them again.

11 We're looking for that modification as
12 we believe that in terms of cultural resource
13 monitoring that is implemented through the various
14 conditions, that it should be tied to when a
15 potential effect to known or unknown cultural
16 resources could occur.

17 And that would be when there is project
18 related activities that would be disturbing native
19 soils. For example, in the tank farm area where
20 there is adequate evidence that the tank farm area
21 is overlain by five to six feet of nonnative fill.
22 That activities such as tank demolition that would
23 be completely in that nonnative fill, that
24 cultural resource monitoring would not need to
25 occur at that location.

1 We're wanting to insure through this
2 that as the project progresses and proceeds into
3 its design phase that adequate information is
4 available to the cultural resource specialist to
5 be able to know when monitoring needs to occur and
6 develop appropriate plans.

7 And so we are looking to go ahead and
8 have that clarification so that we can get the
9 condition timed appropriately.

10 In terms of the verification for
11 CULTURAL-1, there would also be the change
12 currently it reads, at least 90 days prior to the
13 start of ground disturbance. We would change that
14 to read, at least 90 days prior to the start of
15 native soil ground disturbance.

16 For CULTURAL-2, similar comment and
17 similar rationale. The first line of the
18 condition, itself, we would recommend reads prior
19 to the start of native soil ground disturbance.
20 Also the verification would be changed to read, at
21 least 75 days prior to the start of native soil
22 ground disturbance.

23 CULTURAL-3, a similar change in the
24 first line of the condition, prior to the start of
25 native soil ground disturbance. And a similar

1 change for the verification.

2 CULTURAL-4, that deals with worker
3 environmental awareness training. We would like
4 to see some clarification on that. It's our
5 interpretation that that is for construction
6 workers. So we would recommend that the first
7 sentence of CULTURAL-4, a word be added that would
8 say construction worker environmental awareness
9 training for all new construction workers, adding
10 the word construction.

11 Continues on, shall be conducted prior
12 to and during periods, again, of native soil
13 ground disturbance. And the verification for
14 CULTURAL-4, we would change to say at least 30
15 days prior to the start of native ground
16 disturbance.

17 CULTURAL-5, which goes into more
18 specifics about the training program or the
19 environmental awareness training for construction
20 workers. Several changes on this. Again, up in
21 the very first line, prior to the start of native
22 soil ground disturbance. And, again,
23 clarification that would go on to read, for new
24 construction workers.

25 The other point that we have here is

1 that it reads currently, at a minimum of every two
2 weeks the project owner shall insure that the CRS,
3 that's cultural resource specialist, or qualified
4 individuals approved by the CPM, compliance
5 program manager, provide the cultural compliance
6 manager, CPM, approve cultural resource training
7 in person to all project managers, construction
8 supervisors and workers.

9 We would like to add in the concept that
10 that cultural resource training can be either in
11 person or through the use of a training video to
12 all construction project managers.

13 The reason that we're wanting to make
14 the change to allow for the use of videos is that
15 as projects such as these progress, it is likely
16 that there will be construction workers that may,
17 in fact, be new to the site on a daily basis in
18 some cases as union halls provide additional
19 people on a project-specific basis.

20 We want to insure that each of the
21 workers receive the training without it being a
22 burden on the cultural resource specialist, that
23 he may, in fact, have to be conducting training
24 potentially on a daily basis.

25 We also believe that by developing an

1 appropriate training video that -- and showing
2 that and using that as training mechanism, that
3 each of the construction workers will be getting
4 the same exact information throughout the project.

5 And so that what we may talk about at
6 one training session, given human nature we may
7 gloss over or forget something at a later training
8 session, so we think that this is the best way to
9 provide consistency of the training throughout the
10 project.

11 We also see that given the timeline that
12 from our perspective the training video will
13 provide a good mechanism to provide that training.

14 We've also acknowledged and agree that
15 as part of that training, including the training
16 video that we would propose, that native American
17 participants would be involved, not only in the
18 preparation of that video, but would also be
19 afforded an opportunity to participate on the
20 video, itself, in terms of providing information
21 regarding cultural awareness and awareness of
22 native American issues.

23 CULTURAL-6, the change there is again to
24 indicate that, and this is under the verification
25 for CULTURAL-6, 30 days prior to the start of

1 native soil ground disturbance.

2 CULTURAL-7, change that to read
3 throughout the project site preparation and
4 construction period that involves native soil
5 ground disturbance.

6 On CULTURAL-8 I also had just noticed
7 another change here that we'll need to pick up.
8 On page 108, under CULTURAL-8, it reads, Duke
9 finds this condition acceptable as written,
10 however the verification for CULTURAL-7 should be
11 changed. That should say CULTURAL-8.

12 And the change, again, would be to add
13 the word native soil in front of ground
14 disturbance in the first line of the condition.

15 Also in CULTURAL-8, -- bear with me just
16 a minute, I want to make sure I find the correct
17 location --

18 (Pause.)

19 MR. MASON: We wanted to add into the
20 second paragraph of CULTURAL-8, and the wording
21 may not be quite exact, but I think the meaning
22 comes across, is that the project -- oh, I see
23 where we're at, okay, we're down in the
24 verification, I've now found my location.

25 Under the verification for CULTURAL-8,

1 the last two sentences of the verification we
2 recommend currently reads, the project owner shall
3 provide the CPM with plans to redesign project
4 components to avoid cultural resource sites as
5 soon as, we want to add the word, the plans are
6 completed. And then add, if portions of CA SLO 16
7 or 239 are encountered outside of the established
8 boundaries of the site.

9 It's a clarification to get this
10 sentence to read -- it's actually combining the
11 last two sentences to make it a little bit clearer
12 in terms of what we're trying to accomplish. So
13 it's really, if nothing else it's probably taking
14 out the period after complete and extending those
15 two sentences forward.

16 We find CULTURAL-9, CULTURAL-10,
17 CULTURAL-11 and CULTURAL-12 acceptable as written.
18 Excuse me, that's CULTURAL-9, 10 and 11.
19 CULTURAL-12 we do have one modification under, and
20 this was a change we made earlier, actually, under
21 protocol number C, under CULTURAL-12. That just
22 adds that in addition to drawings of significant
23 or diagnostic cultural resources, that that would
24 read drawings and/or photos. That is consistent
25 with a previous condition that allows photographs

1 in lieu of, or in addition to drawings as part of
2 the cultural reports.

3 We find CULTURAL-13 acceptable as
4 written. CULTURAL-14, which also then references
5 appendix A, to start off with we'll start with the
6 easier portions of it.

7 Again, we would ask that in the first
8 line of the condition that be prior to the start
9 of native soil ground disturbance. The second
10 line currently it says the project owner shall
11 implement the Energy Commission's native American
12 monitoring/consultation plan; that's included as
13 appendix A to this FSA.

14 We believe that since we're going to be,
15 or Duke is going to be implementing it, that that
16 may more appropriately read shall implement the
17 MBPP native American monitoring/consultation plan,
18 and then a parentheses, based on the requirements
19 included in appendix A of the FSA.

20 I think that change, while it may seem
21 inconsequential, at least it puts it into where
22 the plan, itself, is Duke's plan and not the
23 Energy Commission's plan. And I think that would
24 probably be the intent of the staff.

25 We would also ask that condition 14 goes

1 on to read the plan includes arrangements for
2 addressing comments of each group regarding
3 artifacts and sites that may be discovered. After
4 the end of that sentence we're asking for a
5 sentence to be added, the plan also includes
6 requirements that each native American group that
7 decides to participate in monitoring/consultation
8 will be required to meet in order to be under
9 contract to Duke and to work at the Morro Bay
10 Power Plant site.

11 In appendix A we go into a little bit
12 more detail. The issue associated with that is
13 that the native American groups that choose to
14 participate in the monitoring will need to be
15 under contract to Duke. They'll need to have an
16 appropriate business license. They will need to
17 have appropriate insurance. They will need to
18 have the appropriate onsite training in terms of
19 safety procedures that they will need to follow
20 for their work at the plant during construction.

21 This is something that we would require
22 and do require of all contractors. And it is a
23 liability issue that Duke feels strongly about to
24 insure that all workers, whether they be
25 construction workers or native American monitors,

1 are aware of their responsibilities, and that they
2 are appropriately covered through a contractual
3 mechanism.

4 Verification for CULTURAL-14. Currently
5 it says within seven days after certification the
6 project owner shall provide to the CPM copies of
7 sent letter or summaries of phone calls inviting
8 native Americans to identify groups to participate
9 in monitoring and consulting.

10 We suggest a change here. We don't see
11 any, based upon the anticipated schedule for this
12 project, don't see any compelling reason why that
13 activity needs to occur within seven days after
14 the project, or if the project is certified.

15 We believe it would be more appropriate
16 to again tie that notification process to the
17 start of native soil ground disturbance. We're
18 proposing that 60 days prior to the start of the
19 native soil ground disturbance the project owner
20 shall provide the letters that we would send to
21 the native American groups to invite them to
22 participate.

23 One is, again, it gets it in line with
24 the work that's going to be accomplished. But,
25 also, we feel that if the notification were to

1 start immediately after, or seven days after the
2 project is certified, there may, in fact, be some
3 period of time before the actual work would start.

4 It could result in a group either
5 initially deciding they want to participate, and
6 then after it actually gets closer to their actual
7 start of participation, they decide not to. Or
8 vice versa that a group that initially decides
9 they don't want to participate, then decides when
10 it gets closer, gosh, I wish we would; we've
11 already given up our opportunity.

12 And so by making it more immediate,
13 immediate I'm talking 60 days prior to when the
14 activities would begin, I think that it provides
15 people with a good notification process; lets them
16 know what's going to occur and they can make an
17 informed decision at that point that isn't
18 something that may be done a number of months in
19 advance.

20 We also, within that verification, are
21 looking to, through some additional language,
22 provide a mechanism where Duke can provide to the
23 CPM the appropriate documentation regarding the
24 offer for participation, either through letters or
25 phone calls, to the native American groups that

1 have been identified by the Energy Commission, but
2 also provides a certainty to Duke in terms that if
3 they are not getting any response through that
4 period, that at some point in time their
5 activities to try to insure participation comes to
6 an end.

7 And so we're suggesting that at the end
8 of 30 days of that process, 60 days prior to the
9 start, we would notify 30 days prior to the start
10 of native ground disturbance, that we would
11 provide whatever information we receive back,
12 either groups of acknowledging and agreeing to
13 participate, or asking to participate. Of if they
14 were to acknowledge that they don't want to
15 participate, that would be fine.

16 But that if we're getting nothing back
17 at the end of 30 days, that Duke has fulfilled
18 their responsibility and can go forward.

19 So, I have some long language that I
20 won't bother to read at this point, it is in my
21 testimony, to try to establish a mechanism along
22 that. There may be from staff a different way to
23 word that that maybe is more concise. But at
24 least that is the concept.

25 Moving to keep it in order is to go to

1 appendix A, which was the proposed monitoring
2 plan; some changes here, as well. The first line
3 on appendix A, paragraph 1, there was an
4 inconsistency even between CULTURAL-14 and the
5 appendix, itself.

6 It says here within 72 hours of
7 certification, in CULTURAL-14 seven days, and
8 we're proposing that that say 60 days prior to the
9 start of native ground disturbance.

10 And we'd ask that a new paragraph 2 be
11 added. That would again set forth the position
12 that native American groups that decide to
13 participate in the monitoring/consulting will be
14 required to enter into a business contract with
15 Duke.

16 As with other contractors, native
17 American groups that decide to participate in the
18 monitoring/consultation must have a business
19 license; have appropriate liability and workmans
20 compensation insurance; enter into a specific
21 scope of work with defined labor costs and levels
22 of effort for specific tasks with Duke; and adhere
23 to MBPP site-specific worker safety training and
24 equipment programs.

25 And that is something that we would

1 require of any contractor or consultant at Duke.
2 And we would propose that that also be required
3 for the native American monitoring groups.

4 Existing paragraph 2 will become
5 paragraph 3. We are proposing here that the
6 native American monitors and the groups would
7 report to the Duke's project construction manager
8 in coordination with the cultural resource
9 specialist.

10 The way it's currently worded is that
11 each, and this is in existing paragraph 2, it says
12 that within two weeks of receiving a request from
13 the project owner to provide names for monitoring/
14 consultants, each native American group will
15 identify one person from their group to be a lead
16 monitor/consultant reporting to the CRS.

17 That we would -- the position we would
18 take is that that should be reported to the Duke
19 construction manager since the native American
20 group would be under contract to Duke. It's the
21 intent that, again that the cultural resource
22 specialist has various critical functions to
23 accomplish and that the administration management
24 of the native American monitors would take time
25 away from his or her duties. And that with the

1 direct contract to Duke, that the responsibility
2 for management of those groups would be by a Duke
3 representative, that would be in conjunction with
4 the CRS for the actual scheduling and those types
5 of things would be through the construction
6 manager.

7 Existing paragraph 3 of appendix A that
8 would become paragraph 4. Again, we're wanting to
9 make sure that we tie, rather than within four
10 weeks of the Energy Commission certification of
11 the project, preferably before. we want to tie
12 that to 30 days prior to the start of native soil
13 ground disturbance.

14 The Duke project construction manager
15 shall contact the designated monitors/consultants
16 for each of the native monitoring groups that have
17 decided to participate. Again, that is getting it
18 closer to the work that is going to be
19 accomplished so that there's no confusion or
20 ambiguity about when people need to be showing up
21 for monitoring activities and participation.
22 Again, that's really just putting a timeframe that
23 meets with the schedule of the project.

24 The last sentence of existing paragraph
25 3 that's been renumbered to paragraph 4 should be

1 changed -- the last sentence should be changed to
2 a rotating schedule of monitors shall be in place
3 and the Duke project construction manager shall be
4 ready to implement, and it continues on, prior to
5 the start of native soil ground disturbance.

6 Again, putting the responsibility with
7 the Duke project construction manager and not the
8 cultural resource specialist.

9 Existing subparagraph 3A, which will
10 become 4A, is acceptable as written.

11 Existing 3B that would become 4B, this
12 is all in appendix A, we would change to read,
13 again with the same concept, that native American
14 monitoring/consulting for the Morro Bay Power
15 Plant project shall occur under the direction of
16 the Duke project construction manager in
17 coordination with the CRS.

18 Goes on to say under no circumstances
19 shall native American monitors/consult in modern
20 ground disturbing activities without the onsite
21 direction of the project construction manager in
22 coordination with the CRS or CRM.

23 And previously at the beginning we made
24 the change to add to the testimony or correct the
25 testimony, the phrase that says project

1 construction manager in coordination with.

2 Existing paragraph 5 we are again
3 suggesting a change that has to do with inserting
4 the Duke project construction manager on the
5 second line, rather than the CRS, regarding the
6 discovery of cultural resource sites. In this way
7 the native American monitors would be reporting,
8 if you will, and have the most direct assurance by
9 reporting and getting together with the Duke
10 project construction manager about discoveries
11 during construction activities. We believe that
12 that provides a better line of communication.

13 A minor word change, and this is minor,
14 also under paragraph 4. We talk about comments,
15 this is the fifth line, comments shall be provided
16 within 24 hours of being informed of a find and
17 shall be incorporated into the final cultural
18 resource report.

19 We just think it ought to be, and shall
20 be added to, not incorporated into. Again, that's
21 probably a minor wordsmithing that may not be
22 horribly important.

23 And then we agree with the concept of
24 the curation shall -- the native American concerns
25 regarding curation shall be incorporated into the

1 agreement with the curation facility. We agree
2 with that. And we agree with the concept that as
3 long as those concerns do not conflict with
4 professional standards, applicable laws or federal
5 or state guidelines. We believe that that is
6 important.

7 The unnumbered paragraph immediately
8 below existing paragraph 4, we want to clarify
9 that we agree that obviously the state law will be
10 followed if there is the discovery of native
11 American human remains or burial goods during the
12 project.

13 We did want to add, as a point of
14 reference, obviously this includes all portions of
15 the project including the work at Camp San Luis
16 Obispo construction laydown area, and the offsite
17 construction laydown area, as well, at Quintana
18 Road.

19 If native American remains or burials
20 are discovered, we will -- Duke will contact the
21 Native American Heritage Commission who will
22 identify the most likely descendent.

23 The unnumbered paragraph concerning that
24 the final responsibility for determining
25 significant or eligibility, the California --

1 Historic Resources shall lie with the compliance
2 project manager, who must be contacted about such
3 finds by the CRS within 24 hours pursuant to
4 CULTURAL-6.

5 We obviously agree with that. We did
6 want, and this again may go without saying, but we
7 thought for the record we want to insure that
8 clearly, depending on the expertise of the
9 Commission's CPM, that the CPM would, in fact, be
10 consulting as appropriate, with other Commission
11 Staff or consultants that have the expertise to
12 make that determination.

13 Also that any information to be provided
14 by native American monitors or consultants, that
15 we would provide or forward that information to
16 the Energy Commission CPM by the construction
17 project manager, rather than the CRS.

18 Unnumbered paragraph after 4, the last
19 paragraph on appendix A, talks about the native
20 American monitor/consultants rotated may present a
21 discussion of native American concerns regarding
22 cultural resources as part of the training program
23 required as CULTURAL-5.

24 We have concerns about the workability
25 of such an item requiring weekly training rather

1 than two weeks, as required by CULTURAL-5. We've
2 also stated our position regarding using a
3 training video. It would be our intent to work
4 with the native American groups that are going to
5 participate and have them participate in the
6 development of and the filming of that video. So
7 they have an opportunity to provide information to
8 construction workers regarding native American
9 concerns, issues and sensitivity.

10 The concept of rotating through on the
11 training, again we're primarily concerned about
12 insuring that we have continuity in the training.
13 And so that as construction workers come onto the
14 site that they all have the same training and
15 ability to have the same training without
16 information being inadvertently deleted or not
17 talked about, based upon who might be involved in
18 the training at the time. Or, again, just human
19 nature, about glossing over things with the
20 project that may go on for, you know, a number of
21 months.

22 Turning back, to the -- just to wrap up
23 on the remaining two CULTURAL conditions.
24 CULTURAL-15 and CULTURAL-16 both deal with
25 historic resources. We find CULTURAL-15

1 acceptable as written with the following
2 modification.

3 Again, it is more the timing issue that
4 rather than prior to the start of any ground
5 disturbing activities, we want to tie that to
6 prior to the start of demolition or alteration of
7 the existing Morro Bay Power Plant Units 1 through
8 4 in the demolitions, since units 1 through 4 will
9 continue to operate through the majority of the
10 construction period, including all of the support
11 facilities, that the timing for CULTURAL-15 would
12 more correctly be tied to prior to the demolition
13 activities.

14 The verification for CULTURAL-15 should
15 be changed to read rather than at least 90 days
16 prior to the start of project earth disturbing
17 activities, we're suggesting at least 120 days
18 prior to the start of demolition or alteration.

19 This has to do with the identification
20 of the architectural historian that would be
21 involved with the project. The 120 days would
22 provide sufficient time for the Commission to
23 accept the qualification of the architectural
24 historian, and also for us to prepare the various
25 reports that would go along with that.

1 CULTURAL-15 we find acceptable as
2 written. Excuse me, CULTURAL-16.

3 Those are my suggested changes on the
4 conditions.

5 MR. ELLISON: With those clarifications
6 regarding timing and other matters, does Duke
7 agree with all of the conditions of certification
8 proposed by the staff in its final staff
9 assessment, as well as the errata filed by staff
10 to the final staff assessment?

11 MR. MASON: Yes, we do.

12 MR. ELLISON: At this time I'd like Mr.
13 Mason to address the testimony of other parties.
14 The testimony that we have received is two
15 declarations filed by intervenor Patti Dunton. It
16 would be appropriate to identify them for the
17 record at this time.

18 HEARING OFFICER FAY: Ms. Dunton, can
19 you -- do you have those before you? Can you read
20 them and I'll assign an exhibit number to them.

21 MS. DUNTON: You want me to read them?

22 HEARING OFFICER FAY: Just the title.
23 Just identify them.

24 MS. DUNTON: Just identify Mr. Burch's
25 testimony?

1 HEARING OFFICER FAY: Yeah, if you'd
2 just give each of the documents a title, as
3 reflected on the front of the document, so that we
4 can identify it, and I'll give it a number.

5 MS. DUNTON: Okay, I have C.A. Singer
6 and Associates is the first testimony.

7 HEARING OFFICER FAY: That will be
8 exhibit 141.

9 MS. DUNTON: And then I have the
10 declaration of John W. Burch is the other one.

11 HEARING OFFICER FAY: That's exhibit
12 142.

13 MR. ELLISON: Duke has no comment with
14 respect to exhibit 141.

15 But, Mr. Mason, I'd like to address, I
16 direct your attention to exhibit 142, the
17 declaration of John W. Burch. Do you have a copy
18 of that?

19 MR. MASON: Yes, I do.

20 MR. ELLISON: For the record, the copy
21 that we were served with, the left margin deletes
22 some of the text, so we don't have all of the text
23 of the declaration, although we think that we can
24 understand it, nonetheless.

25 I'd like to direct your attention,

1 Mr. Mason, to the third full paragraph. In the
2 middle of that paragraph you see the statement:
3 There must be one monitor from each group during
4 all" and then the next word we have on our copy is
5 "disturbance". Do you see that?

6 MR. MASON: Yes, I do.

7 MR. ELLISON: What is Duke's position
8 with respect to this statement from the declarant,
9 Mr. Burch?

10 MR. MASON: We agree with the concept in
11 principle of each group having basically a full-
12 time monitor, though our caveat would be that we
13 could find that workable if there were two groups
14 wishing to participate.

15 We are required under the condition to
16 notify four groups. If all four groups wanted to
17 participate, we don't believe that it would be
18 workable to have four full-time monitors, but we
19 would be willing to accept two full-time monitors.

20 MR. ELLISON: Lastly, Mr. Mason, did you
21 make any assumption with regard to your testimony
22 regarding the life of the Morro Bay Power Plant
23 project?

24 MR. MASON: For the purposes of cultural
25 resources we assumed this was an indefinite

1 project. With this topic the impacts occur during
2 ground disturbing activities during construction.
3 So we viewed it as an indefinite project.

4 MR. ELLISON: So your testimony -- let
5 me ask the question this way. Would your
6 testimony change in any way if the project had
7 different than, say, a 30-year life?

8 MR. MASON: No, it would not.

9 MR. ELLISON: That completes our direct
10 testimony. I would move the admission of the
11 cultural resources portion of exhibit 134,
12 including the documents incorporated by reference
13 therein, beginning on page 90 and extending
14 through the first half of page 92. I will not
15 read those documents unless the Committee asks me
16 to.

17 HEARING OFFICER FAY: Is there
18 objection? Hearing none, we direct those be moved
19 into the record.

20 MR. ELLISON: The witnesses are
21 available for examination.

22 HEARING OFFICER FAY: The entire panel?

23 MR. ELLISON: Yes. Just for logistics
24 sake I think it's appropriate to address the
25 questions to Mr. Mason. He is our lead witness on

1 the panel. To the extent that Mr. Mason can
2 answer, he will. To the extent that it calls upon
3 the expertise of another member of the panel, he
4 will refer it to that person.

5 PRESIDING MEMBER MOORE: Thanks. Mr.
6 Mason, I have a couple of questions. Early on in
7 your discussion of the paper that you wrote, you
8 described something that said for geoarcheology
9 you had identified an exploration of an area of
10 interest. And I use "of interest" by quote.

11 MR. MASON: Right.

12 PRESIDING MEMBER MOORE: How do you
13 define an area of interest? How does that
14 information come to you, or how do you make a
15 determination?

16 MR. MASON: During the archeological and
17 geoarcheology monitoring of a geotechnical boring
18 investigation on behalf of Duke for collecting
19 geologic and soil information on the project site,
20 it was noted that at some depth below the surface,
21 five to six feet, during those geotechnical
22 borings, which were being monitored, that cultural
23 materials were brought up through the boring
24 process.

25 Based upon that it was determined that

1 there is a subsurface archeological site. Rather
2 than getting specific about its location, given
3 the open public forum, I chose the words area of
4 interest. But it was based upon subsurface
5 cultural materials found during geotechnical
6 boring.

7 PRESIDING MEMBER MOORE: Do you make a
8 statistical determination of that, as well? In
9 other words, in terms of a sample size that may
10 have "x" cubic centimeters of material, you find
11 one fragment and it becomes statistically
12 significant? Or is there some other metric that
13 you use?

14 MR. MASON: I'll probably ask Dr. Parker
15 to address in a little bit more detail, but to put
16 it in context, the area where the geotechnical
17 investigation was occurring had to work around
18 existing structures. And also realizing that for
19 the most part the geotechnical borings were,
20 locations were developed based upon where soil
21 data was needed.

22 So the information that was cultural
23 material that was collected was random in
24 orientation because we weren't able to get access
25 to all locations.

1 PRESIDING MEMBER MOORE: And that would
2 differentiate this from an archeological dig where
3 you'd do a systematic random plot of some kind in
4 order to --

5 MR. MASON: That's correct.

6 PRESIDING MEMBER MOORE: -- establish
7 some systematic metrics?

8 MR. MASON: That's correct.

9 PRESIDING MEMBER MOORE: Okay. Well,
10 let me take you one other area, and that's in the
11 last comments that you were making in response to
12 the intervenors' point.

13 If the project CM is overseeing the
14 native monitors, and let's say that -- for
15 argument let's say that there was a condition that
16 allowed four. And you had four. But they all
17 came from different backgrounds, or they all have
18 perhaps a different bias based on their background
19 in terms of looking at what the evidence was that
20 was being unearthed.

21 How would you propose to adjudicate
22 disputes at that level? And if that's possible,
23 if it's possible that a dispute might arise that
24 would require adjudication, should we not have an
25 appeal process?

1 Otherwise it's conceivable to me that
2 were a project to be going forward and you had one
3 person out of four who had a very different
4 opinion, was adamant that that was right, you
5 could literally bring everything to a stop if you
6 didn't have an arbitration procedure.

7 MR. MASON: That's an excellent point,
8 and I'm glad that you brought it up. There always
9 is the possibility of disagreements or disputes.
10 From our perspective we would look to the CEC's
11 CPM to act a the arbitrator.

12 How that individual would discharge that
13 responsibility probably is something that the
14 Commission Staff is going to have to figure out.
15 But we do agree that, and perhaps not withstanding
16 my testimony, that the condition should be
17 modified to include some framework for dispute
18 resolution.

19 PRESIDING MEMBER MOORE: So, right now,
20 just to be clear, you don't expect that potential
21 dispute resolution to be taking place in the hands
22 of the project CM?

23 MR. MASON: No.

24 PRESIDING MEMBER MOORE: You expect that
25 to be happening by the Energy Commission

1 oversight?

2 MR. MASON: Duke would have a role, but
3 if you take it from the perspective of the Duke
4 construction project manager, whose responsibility
5 it is to build the project on a schedule on a
6 budget, --

7 PRESIDING MEMBER MOORE: Right, then you
8 incur the risk of bias --

9 MR. MASON: Yes.

10 PRESIDING MEMBER MOORE: -- on
11 everyone's part. Okay. So from your standpoint,
12 having the construction project manager from the
13 CEC be the dispute resolver is okay?

14 MR. MASON: Yes.

15 PRESIDING MEMBER MOORE: Thank you.

16 Staff?

17 MS. HOLMES: No questions.

18 HEARING OFFICER FAY: Does the City?

19 MR. SCHULTZ: No questions.

20 HEARING OFFICER FAY: Okay. And I'd
21 like to ask CAPE, Coastal Alliance, if they have
22 any questions.

23 MS. CHURNEY: We have no questions.

24 HEARING OFFICER FAY: Ms. Dunton, do you
25 have some questions?

1 MS. DUNTON: Yes, I do.

2 CROSS-EXAMINATION

3 BY MS. DUNTON:

4 Q Mr. Mason, you just spoke about some
5 boring that was done and some cultural material
6 that was found. Isn't it true that that was in an
7 area of what you consider to be nonnative soils,
8 or fill soil?

9 MR. MASON: I'll ask Dr. Parker if he
10 needs to jump in on this, but the cultural
11 material that was identified or discovered, in how
12 you want to put that, during the geotechnical
13 boring was below the layer of nonnative fill.

14 And I don't know if we need any more
15 clarification than that, but it was at a depth
16 that was below the nonnative fill. There is
17 adequate geotechnical investigations and work
18 showing the extent of the fill.

19 MS. DUNTON: So would you agree then
20 that it is possible to disturb cultural material
21 in nonnative fill?

22 MR. MASON: No, that's not what I said.

23 MS. DUNTON: Okay. So would you please
24 clarify what you determine nonnative fill to be?

25 MR. MASON: The nonnative fill that I'm

1 talking about, depending on the location within
2 the tankfarm, the top five to six, in some cases
3 eight, feet has been determined by various
4 geotechnical investigations to be material that
5 was placed on top of native material, some of it
6 dating back to when the Navy had the property in
7 the 1940s, and as part of the construction of the
8 tankfarm, itself.

9 And that layer is well distinguished.
10 And the cultural materials that were uncovered or
11 discovered during the geotechnical were below the
12 depth of the nonnative fill.

13 MS. HOLMES: I'd like to interject at
14 this point and ask the Hearing Officer for some
15 guidance on dealing with some of the
16 confidentiality issues that arise when we discuss
17 specific locations. I think we have some concerns
18 about that.

19 HEARING OFFICER FAY: Well, is there any
20 question among any of the participants, not
21 members of the public, but those who are parties,
22 that they might have to raise matters that are
23 confidential and that might put a risk to some of
24 the cultural sites?

25 MS. DUNTON: No. And I just asked that

1 as a general question, because they want to change
2 the wording to nonnative soils. So I was just
3 asking that in a general question.

4 HEARING OFFICER FAY: Okay.

5 MS. DUNTON: What his determination of
6 nonnative soils was.

7 PRESIDING MEMBER MOORE: Actually, let
8 me just say, just so I understand, I did not hear
9 that they were wanting to change the wording to
10 nonnative soils. I understood that they wanted to
11 distinguish between nonnative soils and native
12 soils. They wanted to make that distinction in
13 terms of timing.

14 If I'm in error, then please let me
15 know, Mr. Mason. But I did not understand what
16 the intervenor understood.

17 MS. HOLMES: My concern relates not to
18 this discussion of native soil versus nonnative
19 soil. It's the identification of the site that
20 people are discussing.

21 PRESIDING MEMBER MOORE: The sites,
22 themselves, and we'll keep this on a general
23 plane, and we'll ask in the answers to these
24 questions if you'll please keep it, if not
25 generic, at least let's talk about categories so

1 we don't identify sites.

2 Can you go back to my question?

3 HEARING OFFICER FAY: And also before
4 you start, I hope everybody understands the
5 importance of keeping these sites confidential.
6 It's to protect them against pot-hunters and that
7 sort of thing.

8 So, if anybody starts to skirt the edges
9 of confidentiality, if it is essential for the
10 Committee to know about, we're going to have to go
11 off the record and have an in-camera discussion
12 regarding that information.

13 I would very much like to avoid that.
14 And I don't see any reason that we have to get
15 into that.

16 PRESIDING MEMBER MOORE: Thanks. Mr.
17 Mason.

18 MR. MASON: The distinction that we are
19 making in the suggested modifications to the
20 conditions is tying, in most cases, the start of
21 cultural resource monitoring and native American
22 monitoring to those construction- or project-
23 related activities that are occurring in native
24 soils.

25 So that activities that are occurring

1 within areas that are nonnative fill would not
2 need to have cultural resource monitoring.

3 I believe that your understanding of
4 what I've said is the same. And I can't speak for
5 Ms. Dunton.

6 PRESIDING MEMBER MOORE: I understand
7 that you can't. Ms. Dunton, back to you.

8 MS. DUNTON: No, that was my
9 understanding, that only in nonnative soils there
10 would be monitoring, that was my understanding.

11 HEARING OFFICER FAY: Only in native
12 soils.

13 PRESIDING MEMBER MOORE: No, no, in
14 native soils.

15 MS. DUNTON: In native soils, I'm sorry.
16 That was my understanding.

17 PRESIDING MEMBER MOORE: Okay.

18 HEARING OFFICER FAY: You can go ahead
19 with your questions.

20 MS. DUNTON: Okay. Some of the other
21 changes that you made in your testimony, you
22 changed from seven days you changed to 60 days
23 after certification.

24 Now, would that be at the time that the
25 other native Americans would begin participation?

1 Or was that when they would just be asked or given
2 a chance for participation? So it would be 60
3 days prior to the project instead of seven days
4 after certification?

5 MR. MASON: What we're proposing is,
6 rather than seven days as addressed in CULTURAL-
7 14, or 72 hours as identified in appendix B, that
8 60 days prior to the start of native ground
9 disturbance we would begin the process of
10 contacting the native American groups listed by
11 the Energy Commission to offer them an opportunity
12 to participate.

13 MS. DUNTON: So, any opportunity to
14 participate before then they wouldn't have a
15 chance or be involved in any of that other
16 opportunity during the planning or any other
17 phases of the project?

18 MR. MASON: When we take a look at the
19 various conditions of certification of cultural,
20 we are suggesting a consistent timing in terms of
21 start, to tie it to the disturbance of native
22 soils.

23 And so the work that would be
24 accomplished for cultural resources by the
25 cultural resource specialist, who wouldn't be

1 identified until a time prescribed before the
2 start of native ground disturbance, and the
3 participation of the monitors would basically be
4 starting at the same time.

5 MS. DUNTON: Okay, so what I am to
6 understand that the other native American groups
7 that are in the FSA wouldn't have any
8 participation in the project until the actual time
9 of ground disturbance?

10 MR. MASON: In accordance with the
11 conditions of certification that would be correct
12 in terms of participation through those
13 conditions. The opportunities for involvement in
14 the project by native American groups is ongoing
15 today, as even a part of this hearing.

16 HEARING OFFICER FAY: Mr. Mason, you're
17 speaking to the involvement regarding monitoring,
18 correct?

19 MR. MASON: That's correct.

20 HEARING OFFICER FAY: Right.

21 MS. DUNTON: Okay, thank you. I wonder
22 if I could ask Mr. Parker some questions? If that
23 would be all right?

24 MR. MASON: Yes.

25 MS. DUNTON: Mr. Parker, on page 96 of

1 the applicant's testimony you stated that the
2 Chumash belonged to the Hokan language group. Is
3 this true?

4 DR. PARKER: Yes.

5 MS. DUNTON: You also mentioned that the
6 Hokan language group is thought to be the oldest
7 in California, and even the new world, is that
8 true?

9 DR. PARKER: Yes.

10 MS. DUNTON: Also, Mr. Parker, as part
11 of your qualifications on page 88, you had stated
12 that you had worked as an archeologist in 30
13 different counties in California. Is that true?

14 DR. PARKER: Yes.

15 MS. DUNTON: Would you then say that you
16 know quite a bit about California native
17 Americans?

18 DR. PARKER: Yes, I believe I do.

19 MS. DUNTON: Okay. With all your
20 knowledge about California native Americans, I
21 notice that you failed to mention in your
22 testimony that the Salinan people also belong to
23 the Hokan language group. Is that true?

24 DR. PARKER: That's correct, the Salinan
25 people do belong to the Hokan language group.

1 MS. DUNTON: Thank you. Do you consider
2 yourself an authority on Salinan culture?

3 DR. PARKER: No, I don't.

4 MS. DUNTON: Okay. Also, Mr. Parker, in
5 your testimony on page 101 you mention some key
6 aspects for the protection of cultural resources
7 during the modernization project. Is that true?
8 You might not have mentioned them, but Duke has
9 mentioned certain aspects.

10 DR. PARKER: I'm not familiar with
11 particular aspects you're --

12 MS. DUNTON: Okay, it's on page 101. It
13 says key aspects for the protection of cultural
14 resources.

15 DR. PARKER: The bulleted items that are
16 listed there?

17 MS. DUNTON: Yeah, the bulleted items,
18 that's right.

19 DR. PARKER: Yes.

20 MS. DUNTON: Would you agree that in
21 these aspects that an MOA between Duke Energy and
22 the San Luis Obispo County Chumash Council, as
23 recommended by the City of Morro Bay, was entered
24 into to establish the monitoring and the
25 protection of cultural resources during the

1 modernization project? Is that a true statement?

2 DR. PARKER: The initial memorandum of
3 agreement between the San Luis Obispo County
4 Chumash Council and Duke Energy was to fulfill
5 that requirement, yes.

6 MS. DUNTON: Yes. Also it mentions that
7 the cultural resource team was formed as part of
8 an MOA consisting of an archeologist, a
9 geoarcheologist and the San Luis Obispo County
10 Chumash Council. Is that true?

11 DR. PARKER: Archeologist and geo-
12 archeologist was made part of that MOA agreement.

13 MS. DUNTON: Also in the list of aspects
14 on this page, would you agree that Duke only
15 mentions plans on keeping the San Luis Obispo
16 County Chumash Council informed about the project?

17 I believe it's in --

18 HEARING OFFICER FAY: Is that the fourth
19 bullet?

20 MS. DUNTON: -- the fourth bullet,
21 you're right.

22 MR. ELLISON: And your question is
23 confined just to this page, is that correct?

24 MS. DUNTON: Yes.

25 DR. PARKER: Yes, a memorandum of

1 agreement was designed to keep the San Luis Obispo
2 Chumash Council informed of the project.

3 MS. DUNTON: Thank you.

4 MR. ELLISON: Incidentally, just in the
5 interest of time, on a procedural matter, you can
6 presume, and we will stipulate if there's any
7 question, that all the members of the panel
8 believe that all of the facts in the prefiled
9 testimony are true. When Mr. Mason responded to
10 that question --

11 MS. DUNTON: Okay.

12 MR. ELLISON: -- he was responding on
13 behalf of the panel. And so if you have any
14 particular things you want to get into, you know,
15 you're welcome, but you do not need to ask each
16 member of the panel if they agree that --

17 MS. DUNTON: Okay.

18 MR. ELLISON: -- each statement is true.

19 MS. DUNTON: Also, have you read the
20 conditions of certification, Mr. Parker, the FSA?

21 DR. PARKER: Yes, I have.

22 MS. DUNTON: Okay. Doesn't it establish
23 the MOA between Duke Energy and the San Luis
24 Obispo County Chumash Council in those
25 certification that establishes that? Or mentions

1 it? Let's say it mentions it.

2 DR. PARKER: I believe there is some
3 mention, yes.

4 MS. DUNTON: Of the MOA in the --

5 MR. ELLISON: If you're not sure, Dr.
6 Parker, --

7 DR. PARKER: I'm not sure.

8 MR. ELLISON: -- we probably out to let
9 the FSA speak for itself. I'm not sure what the
10 answer is to that, but if it's mentioned, it is.
11 And if it's not, it's not. And if you're not
12 sure, don't speculate.

13 DR. PARKER: I'll withdraw my statement.

14 MS. DUNTON: Okay, that's fine.

15 (Laughter.)

16 MS. DUNTON: But you know about the MOA?

17 DR. PARKER: Yes, I do.

18 MS. DUNTON: And do you believe that
19 Duke has a responsibility to uphold the agreements
20 made in the MOA? And do you see any kind of
21 conflict between their ability to uphold the MOA
22 and to meet the conditions of certification?

23 DR. PARKER: I don't see any problem
24 with upholding the MOA and also meeting the
25 conditions of certification.

1 MS. DUNTON: Even when it says that they
2 have to be involved on an equal basis? And that
3 the San Luis Obispo County Chumash Council is now
4 being involved in the project through this MOA,
5 and the other native Americans, as Mr. Mason said,
6 would not be involved until actual ground
7 disturbance of the project?

8 DR. PARKER: It's my understanding at
9 this point that there will be no native American
10 involvement in this project until just before
11 ground disturbance occurs, aside from these public
12 hearings.

13 MS. DUNTON: Okay. Mr. Parker, isn't it
14 true that you were involved in an archeological
15 project in Morro Bay which included the
16 participation of simultaneous monitoring by both
17 Chumash and Salinan?

18 DR. PARKER: Yes, it was.

19 MS. DUNTON: So would then you agree
20 that there are other ways of monitoring than that
21 recommended in the FSA conditions of certification
22 on page 2.4-3, appendix A, which says rotating,
23 which they're recommending rotation?

24 DR. PARKER: I'm sure there are a lot of
25 different possibilities for monitoring programs.

1 MS. DUNTON: Okay. Thank you, that's
2 all the questions I have.

3 HEARING OFFICER FAY: Okay. Thank you,
4 Ms. Dunton. That concludes cross-examination. Do
5 you have any redirect, Mr. Ellison?

6 MR. ELLISON: I do have just a couple
7 questions.

8 HEARING OFFICER FAY: Okay, and then
9 we'll take a break right after that.

10 MR. ELLISON: Okay. I'll direct these
11 to Mr. Mason, as the lead witness.

12 REDIRECT EXAMINATION

13 BY MR. ELLISON:

14 Q Mr. Mason, Ms. Dunton asked you a couple
15 of questions about the timing of the monitoring
16 and the change from seven days after certification
17 to 60 days prior to disturbance of native soils.
18 Do you recall those questions?

19 MR. MASON: Yes, I do.

20 MR. ELLISON: Is there, in Duke's
21 proposal and in the certification conditions --
22 strike that. Let me ask it this way.

23 If the certification conditions were
24 adopted with the amendments you proposed, would
25 there be a distinction between let's say the

1 Chumash and the Salinan with respect to when they
2 would become involved under the conditions, when
3 they would begin monitoring? Or would they be
4 treated the same?

5 MR. MASON: They would be treated the
6 same.

7 MR. ELLISON: And is there a distinction
8 between the date of notification and the date that
9 the actual monitoring would begin? Are those
10 different things?

11 MR. MASON: Yes, they are.

12 MR. ELLISON: And could you briefly
13 explain the difference?

14 MR. MASON: Under condition CULTURAL-14
15 and appendix A, the notification process that
16 we're recommending starts 60 days prior to native
17 ground disturbance, is the activity that Duke
18 would undertake to notify the four native American
19 groups, identified by the Commission Staff, of
20 their opportunity to participate as native
21 American monitors in the program.

22 The start of monitoring occurs after a
23 process whereby those groups have responded, or
24 perhaps not responded, in terms of their interest
25 in participating.

1 So the monitoring would start after the
2 groups have identified their interest in
3 participating or not participating. And the
4 monitoring would go forward with those groups who
5 have expressed an interest to participate.

6 MR. ELLISON: That's all I have, thank
7 you.

8 HEARING OFFICER FAY: Okay, any
9 questions on just those redirect questions? No
10 followup? I see no indication.

11 Okay, let's take a ten-minute break.
12 We're off the record.

13 (Brief recess.)

14 HEARING OFFICER FAY: I understand
15 there's some questions from the Committee of Mr.
16 Mason.

17 MR. O'BRIEN: Mr. Mason, I have a couple
18 of questions for you, clarifications really.

19 On page 109 of CULTURAL-14, in terms of
20 the additional language that you added, the
21 sentence that begins, the plan also includes a
22 requirement that each native American group that
23 decides to participate in monitoring/consultation
24 will be required to be under contract to Duke, to
25 work at the MBPP site.

1 Deleting "in order to" and then the word
2 "and" after Duke, does that still maintain the
3 intent of what it is you're trying to convey?

4 MR. MASON: To make sure I'm clear let
5 me read what that change would be then, starting
6 with monitoring/consultation, will be required to
7 be under contract to Duke to work at the MBPP
8 site?

9 MR. O'BRIEN: That's correct.

10 MR. MASON: Yes, that is a good
11 clarification or a cleanup in language. That
12 would be fine.

13 MR. ELLISON: Actually, let me take a
14 shot at addressing, I think there is a difference,
15 and let me just explain what I think it is. I
16 don't know that it matters, Bob, but just the
17 language as it appears in the written testimony
18 would require that the plan include the conditions
19 that Duke requires in order to have a contract
20 with Duke, liability insurance, business license,
21 those sorts of things.

22 So that would actually, those things
23 would be in the plan so that people would know.

24 If you change the language as you just
25 suggested then it would say that the plan requires

1 that you be under contract with Duke. But would
2 not necessarily require the inclusion of those
3 conditions for being under contract with Duke.

4 It may be a distinction without a
5 difference, but I wanted to make sure, Bob, that
6 you were aware of it.

7 MR. MASON: That's an excellent point.
8 Let me think about that just for a second.

9 MR. O'BRIEN: While you're thinking, Mr.
10 Mason, the reason for the question was not to make
11 a suggestion, but the language as it appeared to
12 me was unclear. And the changes that I made I
13 thought provided clarification. That was my only
14 intent in raising the question.

15 MR. MASON: Maybe the best way for us to
16 try to clarify or to determine how best to word
17 this -- Mr. Ellison is correct, that we are
18 wanting the plan to include the specific
19 requirements that each of the native American
20 monitors would need to meet in order for them to
21 become, or to enter into a contract with Duke.

22 Maybe there's a different way to word
23 it, but there is a subtle distinction there that
24 is important.

25 HEARING OFFICER FAY: I'll suggest that

1 applicant address this in their brief so that we
2 have, you know, the exact strike-out and underline
3 version on all the cultural conditions to make it
4 very clear what changes you're recommending. And
5 also your rationale for why.

6 Anything further?

7 MR. O'BRIEN: Yes. An additional
8 question for you on item number 2 at the top of
9 page 112. Talking about the native American
10 groups that decide to participate in the
11 monitoring/consulting will be required to enter
12 into a business contract with Duke.

13 Does that indicate that those
14 individuals will receive compensation from Duke?

15 MR. MASON: Ultimately that will depend
16 upon, for lack of a better term, perhaps a
17 contract negotiation with Duke. Some native
18 American groups may choose and request to be
19 compensated. And Duke would enter into an
20 appropriate agreement.

21 If one of the native American groups was
22 willing to participate at no cost, Duke would also
23 enter into an appropriate agreement on that basis,
24 as well.

25 MR. O'BRIEN: Well, let me ask you this,

1 then. What is the rationale supposing that no
2 compensation would be paid to a native American
3 group to require them to have a business license,
4 for example?

5 MR. MASON: I am not a contract
6 attorney. So I will defer on that. The intent
7 here is to insure that an appropriate contract or
8 agreement could be reached between Duke and the
9 native American groups to insure that under the
10 terms of that agreement that if there is
11 compensation that they have the ability to enter
12 into that with a business license.

13 Some of the other items that are
14 important are regarding the liability and the
15 compensation insurance. So, when we wrote this it
16 was probably under the assumption that
17 compensation would be a part of this package. If
18 compensation was not a part, and it was determined
19 that in order to have an agreement that a specific
20 business license was not required, that could be
21 handled in that way.

22 Again, I probably already marched way
23 over where my expertise lies in terms of business,
24 but the intent is to make sure that we can have
25 some sort of formalized agreement between the

1 native American groups and Duke, itself.

2 MR. ELLISON: Let me offer one comment
3 on that, because there is a legal question
4 associated with it. It is my understanding that
5 among the reasons that Duke requires a business
6 license and those sorts of things that we've been
7 discussing is that Duke is, in turn, required by
8 its liability insurer to only contract with
9 licensed businesses and things of that nature.

10 We can confirm this and address it in
11 the briefs if you're concerned about it. But I
12 think part of the concern here is in order to
13 comply with the requirements of Duke's liability
14 insurance.

15 PRESIDING MEMBER MOORE: Thank you, Mr.
16 Mason, and the panel. Appreciate that.

17 HEARING OFFICER FAY: Yes, thank you.
18 And now we'll move to the staff presentation on
19 cultural resources.

20 MS. HOLMES: Thank you. Staff's
21 witnesses are Rob Wood of the Native American
22 Heritage Commission, Gary Reinoehl and Dorothy
23 Torres. They all need to be sworn.

24 HEARING OFFICER FAY: Please swear the
25 witnesses.

1 Whereupon,

2 ROB WOOD, GARY REINOEHL

3 DOROTHY TORRES

4 were called as witnesses herein, and after first
5 having been duly sworn, were examined and
6 testified as follows:

7 PRESIDING MEMBER MOORE: Counsel.

8 MS. HOLMES: We need to have some
9 exhibits marked, so I'll wait for Mr. Fay.

10 HEARING OFFICER FAY: Okay.

11 MS. HOLMES: First of all, I don't
12 believe that the FSA part two has an exhibit
13 number, yet. And it will certainly need one.

14 HEARING OFFICER FAY: That will be
15 exhibit 143, Staff FSA Part Two.

16 MS. HOLMES: In addition, there were two
17 attachments to the staff response to applicant's
18 motion to amend the schedule that we filed on
19 January 22, 2002. Attachment B is errata to the
20 cultural resources testimony; and attachment A is
21 the qualifications of Mr. Wood. I don't know
22 whether you want to identify those separately or
23 as a single document.

24 HEARING OFFICER FAY: Can we just
25 identify them as a single document?

1 MS. HOLMES: Do you want to identify
2 them the entire staff response, a legal filing. I
3 don't have an objection to it, but --

4 HEARING OFFICER FAY: Yes, I don't have
5 that in front of me to see just --

6 MS. HOLMES: It was --

7 HEARING OFFICER FAY: -- come in as a
8 single document?

9 MS. HOLMES: Yeah, it did. It was the
10 response that we filed with respect to some of the
11 scheduling issue, and as well, the late-filed data
12 from Duke on hydrazine. And we attached to it,
13 since we were, rather than make separate filings,
14 we attached the errata for staff's cultural
15 resources testimony, and we attached Mr. Wood's
16 witness qualifications.

17 PRESIDING MEMBER MOORE: It's not
18 numbered sequentially, then?

19 MS. HOLMES: The attachment B actually
20 begins on page 36 because it's errata that are
21 drafted in underlined/strikeout format. So it's
22 simply page 36, 37, 45, 46 and 47. Those are the
23 page numbers at the bottom, because they are taken
24 directly from the FSA part two.

25 HEARING OFFICER FAY: Okay. Can you

1 just give us a title that reflects what is on the
2 cover page of the document?

3 MS. HOLMES: The entire document -- yes,
4 staff responds to applicant's motion to amend
5 schedule and comment on other procedural issues
6 for the January/February hearings.

7 HEARING OFFICER FAY: Okay, let's just
8 label that exhibit 144. And just keeping in mind
9 that any reference to that is going to have to
10 have some subpart reference, as well.

11 MS. HOLMES: To the attachments.

12 HEARING OFFICER FAY: To the particular
13 corrected --

14 MS. HOLMES: Correct. And in addition,
15 in that staff responds to applicant's motion. We
16 identified that Mr. Wood would be sponsoring two
17 letters that he drafted on behalf of the Native
18 American Heritage Commission to Dorothy Torres of
19 the CEC Staff.

20 One of those letters is dated October 5,
21 2001; the other is dated March 26, 2001. I think
22 those should be labeled as exhibits.

23 HEARING OFFICER FAY: The first in
24 sequence is exhibit 145; and the second one is
25 exhibit 146. Thank you.

1 MS. HOLMES: Let me start with Mr.
2 Reinoehl and Ms. Torres.

3 DIRECT EXAMINATION

4 BY MS. HOLMES:

5 Q Do you have in front of you a copy of
6 what has been now identified as -- or the cultural
7 resources portion of what's been identified as
8 exhibit 143, and attachment B to exhibit 144, the
9 errata?

10 MS. TORRES: Yes.

11 MS. HOLMES: And were those documents
12 prepared by you or under your direction?

13 MS. TORRES: Yes.

14 MS. HOLMES: And were your
15 qualifications included in the cultural resources
16 portion of exhibit 143?

17 MS. TORRES: Yes, they were.

18 MS. HOLMES: And are the facts contained
19 in that testimony true and correct to the best of
20 your knowledge?

21 MS. TORRES: Yes.

22 MS. HOLMES: And do the opinions
23 contained in that testimony represent your best
24 professional judgment?

25 MS. TORRES: Yes, they do.

1 MS. HOLMES: Thank you. Now, I'd like
2 to turn to Mr. Wood. Mr. Wood, could you briefly
3 describe what your responsibilities are at the
4 Native American Heritage Commission.

5 MR. WOOD: Yes. We respond to
6 inadvertent finds of native American human remains
7 by Health and Safety Code, and also Public
8 Resources Code. And identify most likely
9 descendants to respond to those incidences.

10 MS. HOLMES: Thank you. I've already
11 said that a statement of your qualifications was
12 included in attachment A to exhibit 144. I assume
13 that's a true and correct statement of your --

14 MR. WOOD: I would hope so.

15 MS. HOLMES: -- experience. Thank you.
16 The letters that you drafted and sent to the CEC
17 have been identified as exhibits 145 and 146. Is
18 it fair to state that the statements in those
19 letters represent Native American Heritage
20 Commission office practice?

21 MR. WOOD: Yes, it is.

22 MS. HOLMES: Thank you. I'd like to ask
23 you a couple of questions about what was in those
24 letters. You discuss in there the fact that when
25 there is discovery of human remains in disputed

1 territories, you recommend inclusion of all
2 groups. Is that a fair characterization?

3 MR. WOOD: That's -- could you restate
4 that?

5 MS. HOLMES: When there's discovery of
6 human remains in territory that's disputed, the
7 Native American Heritage Commission recommends the
8 inclusion of all culturally affiliated groups?

9 MR. WOOD: Well, what we do in disputed
10 areas is we identify most likely descendants from
11 both groups you ask to respond to the incident.

12 MS. HOLMES: And would that include
13 groups within a particular tribal affiliation?

14 MR. WOOD: Correct.

15 MS. HOLMES: Thank you. To the best of
16 your knowledge is this a disputed territory?

17 MR. WOOD: Yes, it is.

18 MS. HOLMES: Can you explain why you've
19 reached that conclusion?

20 MR. WOOD: Well, based on information
21 that's been received by the Heritage Commission
22 from both the Salinan cultures and also the
23 Chumash cultures, it appears that it was a multi-
24 use area between approximately Morro Bay, Morro
25 Rock and the present day Monterey/San Luis Obispo

1 County line.

2 We received credible information in
3 terms of ethnohistory from both sides of the
4 issue. And so in order to be fair the Commission
5 has decided to identify most likely descendants
6 from both cultures in that area.

7 MS. HOLMES: And you wouldn't recommend
8 that the Energy Commission select one group over
9 another in identifying MLDs or engaging in or
10 requiring monitoring would you?

11 MR. WOOD: Well, we wouldn't do that in
12 terms of MLD selection. Of course, that purview
13 is up to the Commission. But in terms of
14 monitoring, the Commission doesn't get involved in
15 that issue and that's up to the contractor to make
16 that decision.

17 But we publish guidelines for monitors
18 indicating that we feel it's appropriate to select
19 those people that are culturally affiliated with
20 that particular area when selecting monitors.

21 MS. HOLMES: And now I'd like to turn
22 back to the staff. Before we march through the
23 comments that Duke made with respect to the
24 conditions of certification, I'd like to ask you a
25 question about the project life.

1 Duke has stated that the design life of
2 the project is approximately 30 years. If the
3 project were to operate in excess of 30 years
4 would that change your conclusions with respect to
5 significance of impacts or sufficiency of
6 mitigation measures?

7 MR. REINOEHL: No, it would not change
8 the conditions.

9 MS. HOLMES: Thank you. Why don't we
10 march through the proposed changes that Duke made
11 earlier this afternoon. Rather than having me ask
12 a question about each one, I think it's
13 appropriate for you just to go through and note
14 your response for the record.

15 MR. REINOEHL: In a number of the
16 conditions there's mention of native soil; that's
17 in conditions 1, 2, 3, 4, 5, 6, 7, 8 and 14. And
18 we'll address that as a single issue.

19 I believe one of the points that Ms.
20 Dunton was trying to get at today is that
21 nonnative soils, disturbed soils sometimes contain
22 cultural resources. That's also the feeling and
23 knowledge of the staff of the CEC.

24 Not only can disturbed soils contain
25 cultural resources that may need to be evaluated

1 per the California Register, but there may also be
2 human remains that are in those disturbed soils.
3 And those are subject to particular conditions of
4 state law.

5 In this particular case with the Morro
6 Bay Power Plant, there are two sites that have
7 been identified that have had disturbance to them;
8 one of which had numerous human burials recorded
9 in that site. And that a disposition of that soil
10 is unknown. We don't know if it's in the field
11 that's on the plant site, or if it's somewhere
12 else. And there is a concern that those human
13 remains and cultural materials could be in some of
14 the fill soils.

15 There's also a concern that some
16 disturbed soils coming from dredged soils, as was
17 documented by Duke, that dredged soils which are
18 taken from underwater, could contain one, deposits
19 that were on the ground surface, terrestrial
20 deposits when the sea level was lower. And now
21 that the sea level is higher and they're
22 inundated, they could be removed from their
23 initial placement and be in fill materials from
24 dredged soils.

25 Secondly, upland resources that could

1 have eroded down into the creekbeds and into the
2 bay where the dredged soils were probably
3 obtained, could contain human remains that have
4 washed out of other sites.

5 So there's still a concern about
6 cultural materials and human remains that could be
7 in disturbed context. Therefore, our conditions
8 all say that during ground disturbance there will
9 be monitoring.

10 MS. HOLMES: And you don't recommend
11 adopting the change that Duke has recommended?

12 MR. REINOEHL: No, we do not recommend
13 adopting that change.

14 MS. TORRES: Condition 4. Duke is
15 proposing that where we'd require all workers to
16 receive environmental awareness training, they're
17 proposing that it be changed to construction.

18 The difficulty with that change is that
19 people who are involved in things like vegetation
20 clearance, or who may just be walking perhaps from
21 a parking lot to an office may encounter cultural
22 resources materials and might not recognize them.
23 That's why we're recommending that the condition
24 stand as it is.

25 MS. HOLMES: That's fine, continue,

1 please.

2 MS. TORRES: Okay. Condition number 5,
3 Duke is asking also change to construction workers
4 again, it's not acceptable. We would like all
5 workers trained. However, we realize we are
6 requiring a great deal of monitoring on this
7 project, and for a very good reason. There are so
8 many sites in close proximity to disturbance.

9 We're going to say what we would like to
10 have is we'd like to insist that Duke do a
11 training video. And include all native American
12 monitor participants. And we would like to change
13 the condition to not have in-person training.

14 MS. HOLMES: Thank you.

15 HEARING OFFICER FAY: A training video
16 in lieu of in-person, as a substitute for any in-
17 person training?

18 MS. TORRES: We feel comfortable making
19 this change because of the level of monitoring
20 required on this project. We'll have a lot of
21 experts able to identify cultural resources.

22 MR. REINOEHL: In condition CULTURAL-8
23 there's a proposal to change a reference -- the
24 sentence where we use the word "they" and changing
25 it to plans. We do not object to that change.

1 That does provide clarification.

2 The sentence was -- there were two
3 sentences that were put together, and in our
4 errata we had changed the second sentence to read,
5 if portions of SLO 16 or 239 are encountered
6 outside of established boundaries the CPM will be
7 notified within 24 hours. And that was to provide
8 some clarification on what would happen if they
9 encountered that.

10 And with this change we think it would
11 not be appropriate to incorporate the totality of
12 Duke's suggested changes of running these two
13 sentences together. That with it stated as this,
14 with the first sentence saying, as soon as plans
15 are completed, and then starting the second
16 sentence with the portions of SLO 16 and ending
17 with the project owner shall notify the CPM within
18 24 hours.

19 So we do not accept the full change, but
20 just the change to the plans.

21 HEARING OFFICER FAY: Could you read the
22 portion and then include your modification
23 only, --

24 MR. REINOEHL: Yes.

25 HEARING OFFICER FAY: -- as you would

1 like to see it?

2 MR. REINOEHL: Okay. In the
3 verification for CUL-8 the last two sentences
4 would now read: The project owner shall provide
5 the CPM with plans to redesign the project
6 components to avoid cultural resource sites as
7 soon as plans are completed. If portions of CA
8 SLO 16 or 239 are encountered outside the
9 established boundaries, the project owner shall
10 notify the CPM within 24 hours.

11 Going on to CUL-12, they had asked that
12 that be changed to include and/or photographs in
13 the C section of the protocol. We don't object to
14 that, but we would like a clarification that any
15 scanned or electronic photos be produced at 300
16 dpi. That's a quality that the California State
17 Office of Historic Preservation will accept.

18 Okay, going on to CUL-14. In the first
19 suggested change by Duke, again there's the native
20 soil issue, and we do not accept the native soil.
21 It goes on to say prior to the start of ground
22 disturbance the project owner shall implement that
23 MBPP native American monitors and consultation
24 plans.

25 We agree that it can say -- that it

1 should say the MBPP, since that is what we
2 entitled that attachment.

3 The change to the part that's in the
4 parentheses we do not agree with the proposed
5 change. Ours says included as in appendix A to
6 this FSA we want it included in a way that is
7 attached to the condition, not necessarily as a
8 separate document that has requirements as is
9 stated in Duke's proposed change. So we do not
10 accept that change.

11 Then the issue of the contracts and this
12 sort of all wraps up together, the contracts, the
13 liability insurance, workmans compensation
14 insurance, the business license.

15 We have never had a condition of
16 certification that required anything this
17 specific. We try to make the conditions such that
18 it's as open as possible to allow different venues
19 for native Americans to participate in the
20 projects.

21 In some cases there are volunteers; in
22 some cases native Americans have worked for,
23 directly for the CRS, the cultural resource
24 specialist, worked for their company. And there
25 are other avenues that agreements arrived at in

1 which the native Americans can monitor.

2 We did not want to restrict their
3 participation in the monitoring by requiring these
4 specific items.

5 It also requires a contract. We have no
6 idea what the conditions of that contract may or
7 may not say. They may not be appropriate to what
8 we think is the necessary requirements for
9 monitoring by native Americans in this particular
10 case.

11 HEARING OFFICER FAY: How do you address
12 Duke's concern about liability? And how have you
13 done that in other cases where you have not
14 required these specifics?

15 MR. REINOEHL: It's never come up in the
16 past. This is the first case in which anybody has
17 said it's a problem. I believe when the native
18 Americans have worked for the CRS that they were
19 covered under the liability insurance and workmans
20 comp of the CRS.

21 When they volunteer I am not aware of
22 what the agreement said, so I have no personal
23 knowledge of how that was handled.

24 HEARING OFFICER FAY: Okay, I'll just
25 put the parties on notice. We've got attention

1 here, obviously the bottomline is, from the
2 applicant's point of view is liability, not
3 necessarily, I think, everything on that list, but
4 liability.

5 And in this age of litigation I think
6 that's a reasonable concern. So I'd like to see
7 something in staff's brief that addresses that
8 matter and a way that they suggest can handle it
9 and yet be perhaps less onerous than the long list
10 that the applicant has provided of qualifications.

11 Go ahead, I'm sorry to interrupt you.

12 MR. REINOEHL: That's okay. We'd be
13 happy to do that. And perhaps Duke wouldn't mind
14 paying for the liability insurance if that's
15 necessary for some individuals.

16 PRESIDING MEMBER MOORE: Well, no. No,
17 that's not right. Not for some individuals. What
18 Mr. Fay is asking for is for something that covers
19 any individual that comes in. So when the brief
20 comes back, make sure it addresses anyone who gets
21 on -- is in any way uncovered on the property.
22 There's got to be a solution that doesn't leave
23 any holes.

24 MS. HOLMES: Right, I think Mr. Reinoehl
25 was talking perhaps about people who would

1 otherwise be uncovered. In other words, staff's
2 concern is those people who haven't formed a
3 business shouldn't be required to form a business
4 just to participate.

5 PRESIDING MEMBER MOORE: Shouldn't be --

6 MS. HOLMES: So we will address that in
7 our brief for ways to cover that gap.

8 HEARING OFFICER FAY: But the fact it
9 hasn't been a problem in the past I don't think is
10 a good way to cover it. I think we need some
11 specifics. Because problems can arise in the
12 future. And it sounds like it's something we need
13 to address.

14 MR. ELLISON: If I may, a clarification
15 and a proposal. The clarification is that Duke's
16 concern is not so much about whether the
17 individual has liability insurance for themselves,
18 except to the extent that that's what Duke's
19 liability insurance for itself requires. I'm not
20 sure that everybody follows that.

21 But the point that I wanted to make, the
22 clarification is that the liability concern are
23 conditions placed upon Duke for Duke's liability
24 insurance that we must comply with.

25 And among those conditions are

1 restrictions -- by the way, this is all subject to
2 check, I'm going to confirm all this, but this is
3 my understanding -- among those conditions are
4 requirements that Duke must comply with, with
5 respect to who can be on the site, who they can
6 contract with, those kinds of things. So the
7 concern is that.

8 Secondly, it is our understanding, again
9 subject to check, that this would not restrict
10 representatives among the people that we've been
11 talking about, the Salinan and Chumash. It's
12 certainly not our intention to do that.

13 And let me just conclude by saying we'd
14 be happy to work with staff on some proposed way
15 of resolving this issue, as well as with the
16 intervenors and other parties.

17 HEARING OFFICER FAY: I think that is
18 perhaps the best path. If the staff can see the
19 language that Duke feels constrained by, and then
20 a path can be determined through that, even if it
21 means direct assistance to some of the native
22 American groups that would want to monitor,
23 whether it's, you know, applying for a business
24 license if they don't already have one, or you
25 know, securing those details, we'd ask the parties

1 to get together and address that, and then tell us
2 in their brief what path they're seeking.

3 Go ahead.

4 MR. REINOEHL: Okay, the next item in
5 CULTURAL-14 is the 60 days prior to the start of
6 native soil ground disturbance. And the 30 days
7 prior to the start of native soil ground
8 disturbance. Again, that's an issue of start
9 dates in regards to disturbance.

10 In our condition we had said seven days,
11 let's see, that would provide copies of letters to
12 the Commission seven days after permitting. Our
13 concern was one, that there's other ground
14 disturbance that is an issue besides native soils.
15 And secondly, that the process of working with the
16 native Americans begin as soon as possible so that
17 there is -- so that their concerns can be
18 addressed in a timely manner, and that they can be
19 incorporated into the operations at the new power
20 plant.

21 HEARING OFFICER FAY: Let me again --
22 I'm sorry to keep interrupting you, but I kind of
23 want this information close to your statement on
24 the record.

25 Let me pose a hypothetical. If, for

1 some reason, Duke decides that there is a delay
2 needed in the commencement of construction, how
3 does it help further your goals if seven days
4 after certification groups are contacted,
5 identified, et cetera, and then there's a large
6 gap, say a year, before there's any need to engage
7 them in the objective?

8 MR. REINOEHL: Well, one, start of
9 construction is different than ground disturbance.
10 And so our conditions all say prior to ground
11 disturbance.

12 There can be resources disturbed during
13 preconstruction activities. We want to insure
14 that that is appropriately dealt with in the
15 conditions.

16 Secondly, there is some concern that to
17 date that not -- well, let's just say that we want
18 to insure through these conditions that as soon
19 after permitting as possible that everybody feels
20 that they are being considered and their concerns
21 considered in the project as it goes forward.

22 And that was the reason for the short
23 time limits after permitting.

24 HEARING OFFICER FAY: Thank you.

25 MR. REINOEHL: I guess to make it very

1 clear, we don't agree with these two changes.

2 The next change is regarding
3 notification of native Americans and a nonresponse
4 clause that Duke would like to have put into the
5 condition.

6 Our intent, and the way our condition
7 was worded, was to insure that there was a good
8 faith effort made on the part of Duke to involve
9 all the interested groups in monitoring, and the
10 ability to be informed and provide comments as the
11 project goes forward in cultural resource issues.

12 We think that the conditions that we
13 currently have stated is sufficient for us to
14 understand that Duke has made that effort. We
15 don't see a reason for changing this, and would
16 not agree with the changes.

17 HEARING OFFICER FAY: Doesn't the change
18 just reinforce what you're trying to do? Doesn't
19 it make it clear that after a certain point in
20 time, a tribe, for instance, or an organization
21 will be deemed to have declined the opportunity?

22 MR. REINOEHL: We have asked Duke to
23 show that they have made the effort within four
24 weeks of permitting. And in the plan there are
25 also -- and this is in the errata, there was

1 another group that came forward and this is on
2 page 46, who said they did not want to monitor,
3 but wanted to be informed. And wanted to be able
4 to provide comments.

5 If we make the changes that Duke has
6 suggested right here, it would preclude anybody
7 else from saying that at any time that they wanted
8 to know what was -- to be informed about what's
9 occurring, and to provide comments.

10 HEARING OFFICER FAY: So you want
11 anybody to be able to ask at anytime whether they
12 can join in?

13 MR. REINOEHL: And being informed and
14 providing comments, not necessarily in the
15 monitoring. It's fairly evident, I believe, in
16 the way the plan is stated that Duke will provide
17 within four weeks evidence of what they've done to
18 contact native Americans and a list of proposed
19 monitors. That's what we're asking them to do.
20 We're not asking them to go beyond that to show
21 proof that they've made a good faith effort of
22 including everybody at that point, in terms of the
23 monitoring.

24 There are other groups who have come in
25 fairly late in the process and said they wanted to

1 be informed, and be able to provide comments. I
2 don't think that in any way would be an undue
3 burden for Duke. It's not involving them in
4 monitoring.

5 And we'll provide some additional
6 information in the brief for clarification.

7 HEARING OFFICER FAY: Okay. Go ahead.

8 MR. REINOEHL: Continuing in CUL-14,
9 this is within the plan. There's, again,
10 suggestions by Duke of requirements for business
11 license, workmans comp, et cetera. And our
12 comments are the same on that as previously.

13 In paragraph 3, that native American
14 groups and associated monitors will report to
15 Duke's project construction manager, not a
16 cultural resource monitor or CRS.

17 We do not agree with that change, and
18 this is in several places they have a similar
19 suggested change of reporting to the construction
20 manager.

21 There are comments that are made by
22 native Americans that may be pertinent to
23 evaluation of resources that are discovered during
24 the project. The California Register talks about
25 cultural values and to be able to fully assess

1 resources that may be discovered. Those values
2 need to be discussed in the evaluation of the
3 resource. And we believe it's more appropriate
4 for the native Americans to provide that
5 information directly to the CRS. And that they
6 would be working under the direction of the CRS,
7 as opposed to the construction manager.

8 Going on to page 113, paragraph 5, the
9 verbiage change that was suggested here was that
10 comments provided by the native Americans should
11 be added to, not incorporated into, the final
12 cultural resources report.

13 Again, these comments may be relevant to
14 the cultural values and eligibility of certain
15 resources, and they need to be incorporated into
16 the report, and addressed in that report.

17 We don't object to the second change
18 where it says native American concerns regarding
19 curation shall be filed with, not incorporated
20 into, any agreement with the curation facility.

21 Going on there's another comment about
22 the project manager rather than the CRS, and
23 that's the same comment as before. That they
24 should be directly reporting to the CRS.

25 The next comment was about the video,

1 training video, and I think we've already
2 addressed that in our discussion of CUL-5, that we
3 don't object to having the native American groups
4 that are monitoring be participants in that
5 training video.

6 I think the last comment here, the last
7 two were in CUL-15. Deals with the demolition,
8 alteration of the existing Morro Bay Power Plant,
9 and the timing of that. And there were some
10 clarifications that we needed in terms of the
11 eligibility determination. And the CEC did
12 contract with an architectural historian to
13 provide clarification on the eligibility of the
14 power plant site.

15 And in that subsequent report the
16 consultant provided a boundary of the property,
17 the resource. And a listing of contributing
18 elements to the resource, and noncontributing
19 elements. The reason for that is because
20 contributing elements are the ones you want to
21 report, and the noncontributing don't really
22 matter if you don't want to report it.

23 So we wanted to be very specific about
24 what the resource was; what it was that it was
25 eligible for; why it was eligible. And then you

1 subsequently determined what needs to be reported.
2 And those contributing elements to the resource
3 are detailed in Rick Starzak's report on page 4.

4 And our conditions, the timing is such
5 that those resources and all the contributing
6 elements can be recorded prior to the demolition.
7 Some of those are slated for demolition fairly
8 early in the process. And that is why the timing
9 of this condition. We do not agree with Duke's
10 proposed changes.

11 MS. HOLMES: Do you have any other
12 comments on Duke's prefiled testimony?

13 MS. TORRES: If I can talk to my
14 attorney for a moment?

15 HEARING OFFICER FAY: Sure, go ahead.

16 PRESIDING MEMBER MOORE: Want to go off
17 the record?

18 MS. HOLMES: Can we go off the record?

19 PRESIDING MEMBER MOORE: Off the record.

20 (Off the record.)

21 MS. HOLMES: Thank you. I wanted to go
22 back to Mr. Reinoehl and ask if he had any other
23 comments on the Duke prefiled testimony.

24 And, if not, I'll move on to a couple of
25 questions that came up this morning, or earlier

1 this afternoon.

2 First of all, Duke had proposed a
3 concept, if you will, for consideration involving
4 the use of simultaneous monitors. Mr. Reinoehl,
5 have you had enough time to consider that
6 discussion, could you provide a response to it?
7 And if you can't, if you haven't had enough time,
8 you can say that, also.

9 MR. REINOEHL: We would not object to
10 their being more than one monitor on site at any
11 one time. Our concern is that there are multiple
12 groups, and that they all be treated fairly,
13 equally in the monitoring process.

14 MS. HOLMES: So let's suppose there were
15 three groups who expressed an interest in
16 monitoring. Would staff then prefer to return to
17 the rotational monitoring as opposed to having
18 simultaneous monitoring by two of the three
19 groups?

20 Do you want me to break that down?

21 MR. REINOEHL: No, that's okay. Not
22 necessarily. If Duke agrees that two groups can
23 be onsite at one time, there could be a different
24 kind of rotation setup so that all groups still
25 get to be involved equally with two groups being

1 on site at any one time. That could work, as
2 well.

3 MS. HOLMES: Thank you. Lastly,
4 Commissioner Moore raised an issue earlier this
5 afternoon about the CPM's role in the arbitration
6 of disputes. Could you please explain what types
7 of disputes are appropriate for the CPM to
8 arbitrate and how that process works.

9 MS. TORRES: Well, we thought that we
10 built in a process in CUL-14 and the plan to sort
11 of delay any sort of resolution of any disputes.

12 And the way it would work is we've built
13 in language that requires comments from all the
14 native American groups during monitoring. And
15 should, for example, an artifact be found, and
16 different groups have different interpretations of
17 the artifact, all that information would be
18 carried with the artifact, including the
19 archeologist's report.

20 Whether or not the artifact was
21 significant would ultimately be the decision of
22 the Energy Commission technical staff.

23 MS. HOLMES: Thank you. With that I'd
24 like to move the cultural resources portion of
25 exhibit 143, attachments A and B to exhibit 144,

1 exhibit 145 and 146 into evidence.

2 HEARING OFFICER FAY: And you also have
3 relevant portions of exhibit 116 that modify
4 cultural?

5 MS. HOLMES: Not that I'm aware of.

6 HEARING OFFICER FAY: Okay, that's --

7 MS. HOLMES: I believe the only errata
8 was attachment B to exhibit 144.

9 HEARING OFFICER FAY: Okay. Is there
10 any objection to receiving those exhibits? I hear
11 none, so moved.

12 MS. HOLMES: Thank you. The witnesses
13 are available for cross-examination.

14 HEARING OFFICER FAY: All right, Mr.
15 Ellison.

16 MR. ELLISON: Thank you. Should I
17 address my questions to Mr. Reinoehl or Ms. Torres
18 or does it matter?

19 MS. HOLMES: I think each one can -- go
20 ahead and address them to Mr. Reinoehl.

21 MR. ELLISON: Okay, I'll do that, and
22 then you can refer them as you deem appropriate.
23 Let me, before I begin, say that Ms. Holmes, a
24 moment ago in a question, characterized Duke as
25 having proposed simultaneous monitoring.

1 I do want the record to reflect that
2 that is Duke's response to the proposal in the
3 declaration filed by Ms. Dunton that we were
4 referring to, the Burch declaration.

5 And we were testifying how we understood
6 that proposal, and that if we understood it
7 correctly, it was, although not our preference,
8 acceptable. But it's not Duke's proposal, and
9 it's not appearing for the first time today. It
10 appeared in that declaration when it was filed.

11 CROSS-EXAMINATION

12 BY MR. EVANS:

13 Q With that clarification, if I could
14 refer you to condition CULTURAL-14, and Duke's
15 proposed change regarding the monitors having a
16 contract with Duke.

17 I understood you to testify a moment ago
18 that you rejected that change in part at least,
19 however concerned that it would restrict potential
20 monitors, and that Duke might use its contracting
21 procedures in a restrictive manner.

22 Would it address that concern, the
23 unreasonableness, if you will, of potential
24 contracts if the CPM were authorized to review any
25 proposed contracts and determine whether Duke was

1 behaving reasonably in its contracting?

2 MR. REINOEHL: Not being a contract
3 attorney, I think we would want to talk to our
4 attorney before answering that.

5 MR. ELLISON: Well, I'm not posing you a
6 legal question, I'm just simply asking would it
7 provide you some assurance if you knew that the
8 Energy Commission, through the CPM, who can
9 consult with attorneys as they need to, but the
10 question -- let me restate the question.

11 The question is would you feel that your
12 concern about the reasonableness of the contract
13 could be addressed by giving the CPM the authority
14 to review and rule on that issue?

15 MR. REINOEHL: It would be fine if the
16 CPM reviewed contracts, however we have seen other
17 cases, as I previously stated, where native
18 Americans worked for the CRS. And by requiring a
19 contract and reviewing a contract, it might limit
20 the participation of some people who might want to
21 work for the CRS directly in providing the
22 monitoring service and comments.

23 I'm not sure that that entirely
24 addresses the concerns of contracts limiting the
25 ability of people to participate.

1 MR. ELLISON: Is it your expectation
2 that the monitors will be compensated by Duke?

3 MS. HOLMES: If you have an opinion
4 about that. His testimony does not address that
5 subject.

6 MR. REINOEHL: I would have to say I
7 don't have an opinion on that.

8 MR. ELLISON: The question asked your
9 expectation based upon what you've seen in other
10 projects, would you expect that monitors would be
11 compensated?

12 MR. REINOEHL: That's not a question we
13 ask. It's not a requirement we have in the
14 conditions of certification.

15 MR. ELLISON: That was not my question.
16 I understand you're not requiring it, but my
17 question is based on your experience in other
18 projects is that what you would expect?

19 MR. REINOEHL: In some cases people have
20 been compensated; in other cases they have not.

21 MR. ELLISON: Okay. To the extent that
22 monitors are compensated, and are compensated by
23 Duke, would you agree that that establishes a
24 business relationship between the monitor and
25 Duke?

1 MS. HOLMES: Are you asking as a matter
2 of law, for a legal opinion?

3 MR. ELLISON: No, I'm not asking for a
4 legal opinion. I'm simply saying, does not the
5 compensation by Duke of the monitor establish a
6 business relationship, as that term is used by lay
7 people?

8 MR. REINOEHL: I don't know.

9 MR. ELLISON: To the extent that there
10 is compensation involved, would you not anticipate
11 that it would be appropriate to define the terms
12 of that compensation and when it's paid and
13 various other things in a contract?

14 MS. HOLMES: I think the witness has
15 already answered this line of questioning.

16 HEARING OFFICER FAY: Mr. Reinoehl, do
17 you have any knowledge in this area where monitors
18 on CEC projects have had more than just a
19 volunteer relationship with the project?

20 MR. REINOEHL: I do know of some of
21 those cases, yes.

22 HEARING OFFICER FAY: Okay, that's fine.
23 Would you answer the question, then, please? Your
24 objection is overruled, counselor.

25 Based on your knowledge and experience.

1 I think, it's reasonable to draw on that.

2 MR. REINOEHL: We have, in our
3 conditions for certification, asked for copies of
4 agreements. The content of those agreements is
5 something that's negotiated between the parties.
6 We were not a party to that, other than seeing
7 that agreements were made.

8 There are some cases that people have
9 been compensated; some cases where they've not.
10 Does that answer the question?

11 MR. ELLISON: Let me ask the question
12 this way. You have stated that staff is not
13 requiring compensation. And you have testified
14 that you do not want to require a contract.

15 First of all, let me ask you, is that a
16 fair summary of staff's position?

17 MR. REINOEHL: Yes.

18 MR. ELLISON: Okay. Would you object to
19 Duke requiring a contract if they are compensating
20 the monitor?

21 MR. REINOEHL: Again, I would have to
22 say that that could exclude some people's ability
23 to participate. And if it excluded people's
24 ability to participate, then, yes, I would object.

25 MR. ELLISON: Would you explain how it

1 would preclude someone from participating
2 voluntarily?

3 MR. REINOEHL: As I've said before, the
4 way you ask for agreement, some of those
5 agreements individuals, monitors, native American
6 monitors specifically, have worked for the CRS. I
7 don't see how that would constitute a contract for
8 Duke, if that were the case, on this project.

9 We do not want to limit the ways in
10 which the native Americans can participate in the
11 process.

12 MR. ELLISON: Let me restate my question
13 because it's not our intention to limit
14 participation, either. But it is Duke's business
15 practice, and I think I would say it's the
16 business practice of the Energy Commission and
17 many other entities in the world, to have written
18 contracts where there is a business relationship.

19 And I'm going to define business
20 relationship for the moment as being the payment
21 of compensation.

22 I understood your testimony a moment ago
23 to say that you would object to Duke requiring a
24 contract where it is compensating the monitor. Is
25 that your position?

1 MS. HOLMES: I don't believe that's his
2 testimony. Perhaps we could cut through some of
3 this. I think what Mr. Reinoehl is talking about
4 is situations where there's subcontracting, where
5 Duke contracts directly with the cultural resource
6 specialist, and then there's a subcontract with
7 the monitors.

8 So, perhaps if you could distinguish
9 between those two types of contracts that would be
10 helpful.

11 MR. ELLISON: That's a good point,
12 counsel. Let me clarify that if there is a
13 contractual relationship with a contractor who, in
14 turn, subcontracts, if that is permissible for the
15 purposes of my question. In other words, that
16 does establish a contractual relationship.

17 With that clarification would you object
18 to Duke insisting that there be a contract where
19 there is compensation, understanding that there
20 may be a subcontract relationship included?

21 MR. REINOEHL: Could you provide a
22 little more clarification on exactly what you mean
23 by a contract, so that I could have a little
24 better understanding of what you're asking,
25 because I'm feeling like this is out of my

1 cultural resources expertise.

2 MR. ELLISON: Well, I'm not using the
3 term in any technical sense. I'm using it in the
4 common sense that people understand a contract.
5 And again, with the understanding that the CPM
6 could review the contract if there's any question
7 about its appropriateness.

8 So, with that, if you want me to define
9 contract or define contract as being a written
10 document that establishes the terms of the
11 business relationship between two parties.

12 Does that enable you to answer my
13 question?

14 MS. TORRES: May I clarify something
15 that perhaps explains our confusion. Very often
16 what we see coming in is verification that there's
17 native American monitoring on a project, will be a
18 letter saying, so-and-so has agreed to monitor,
19 and they'll show up. And it's signed by the
20 native American monitor.

21 We have no knowledge of whether or not
22 they're compensated. We only require that there
23 is monitoring on the project. And we reference
24 the guidelines published by the Native American
25 Heritage Commission. And that's pretty much our

1 extent in monitoring.

2 Now, that kind of explains why when
3 you're saying contract, we are kind of at a loss.
4 We're not sure exactly what you're proposing. And
5 you did just clarify that a little bit for us,
6 thank you.

7 MR. ELLISON: You're welcome. Let me
8 get at the heart of the matter, because I don't
9 want to take any more time with this than we need
10 to. But the heart of the matter for Duke is this.
11 Is staff -- staff could be taking one of two
12 different positions, and I simply want to clarify
13 which of the two you're taking.

14 The first position is that the business
15 relationship between the monitor and Duke is up to
16 them. And that staff is not going to intervene in
17 that.

18 The second position is that staff is
19 going to intervene in that and is going to insist
20 that there not be a contract.

21 Could you clarify which of those two
22 positions staff is taking?

23 MR. REINOEHL: You know, I'm not going
24 to say that Duke wouldn't enter into contracts
25 with people to do native American monitoring.

1 That's certainly among the things that would
2 probably occur.

3 But, as Dorothy said, we typically look
4 for an agreement that says that there's an
5 arrangement made that monitors will be there to
6 perform the monitoring function.

7 We have received a variety of kinds of
8 agreements from fairly simple to a number of
9 pages. I don't typically look terribly hard at
10 the content of those, but the fact that the
11 applicant provided us with an agreement that the
12 individuals who have an interest have been
13 included in the monitoring process.

14 If that's done through contracts, it's
15 done through contracts. If it's done through
16 other kinds of agreements, it's done through other
17 kinds of agreements.

18 I would never preclude Duke from a
19 contract between you and native American monitors;
20 nor would I preclude a separate kind of agreement.

21 MR. ELLISON: Okay, let me move on to my
22 second topic. I think we've beaten this one
23 fairly to death.

24 The second topic --

25 HEARING OFFICER FAY: Thank you,

1 counsel.

2 (Laughter.)

3 MR. ELLISON: The second topic is the
4 CPM dispute resolution process that you discussed,
5 Ms. Torres, a minute ago. And let me preface this
6 question by saying Duke's interest here, Duke's
7 concern is that there be, if there's any question
8 about impacts on the construction schedule, it
9 would be a expeditious resolution of any disputes.

10 And so I'd like to ask you, you
11 described a moment ago staff's proposal on the CPM
12 resolving disputes between monitors; and you
13 described an opportunity for people to make
14 comments.

15 How long in your, under staff's vision
16 would it take to resolve a dispute?

17 MS. HOLMES: Just for purposes of
18 clarification, could you please be more specific
19 about what type of dispute, because there's been
20 discussion today about several different types of
21 dispute.

22 MR. ELLISON: Let me characterize it
23 this way, if there were a dispute that the outcome
24 of which would affect the construction schedule in
25 some way. I'd like you to assume whatever, you

1 know, whatever kind of dispute that might be.

2 Could you describe the time that it
3 would take to resolve that dispute under the
4 staff's proposal?

5 MR. REINOEHL: Well, first off, if
6 there's a dispute over human remains, state law
7 specifies what is to be done. If there's some
8 other kind of dispute, typically we try to handle
9 these matters in an expeditious manner.

10 We understand the cost of delaying
11 construction. And we don't want to impede any
12 more than necessary those kinds of delays.

13 I can't give you a specific timeline
14 because it will depend on what the issues are.
15 Some it can be handled in a matter of a few
16 minutes, some of them take longer.

17 MR. ELLISON: Let me be a little more
18 specific. I was not intending to include an issue
19 involving human remains. We understand what that
20 process looks like. I'm focusing only on issues
21 where the CPM is resolving a dispute that does not
22 involve human remains.

23 And the reason, what prompted my
24 question was the reference to a comment period on
25 the issue. And what I'm looking for is whether

1 there's some minimum period of time that staff
2 would insist upon before the CPM would render a
3 decision in order to accept comments.

4 PRESIDING MEMBER MOORE: A maximum
5 period.

6 MR. ELLISON: Well, any period at all.
7 In other words, my experience with the Energy
8 Commission is that the staff handles this case by
9 case, then it's up to the CPM to decide. And
10 depending upon the situation how to resolve it.

11 If that's the case here, that's fine.
12 But I just wanted to know is there some sort of
13 minimum time period that you're looking for that
14 would require the CPM to not resolve the dispute
15 until a certain period of time had passed for
16 comments.

17 MR. REINOEHL: I'm not all together
18 clear on what time period -- there are conditions
19 here that require certain things to be reported to
20 us within certain amounts of time. So if those
21 are reported to us in a timely manner, we likewise
22 respond in a timely manner.

23 Even when they're not given to us in a
24 timely manner, we still try to respond in a timely
25 manner. I don't want that to be misconstrued.

1 So I'm not quite sure what restrictions
2 you're kind of looking at, because, you know, it
3 depends. If things are reported to us in less
4 than 24 hours, we will act on them in as timely a
5 manner as possible.

6 So, I'm not quite sure what time limits
7 you're referring to.

8 MR. ELLISON: That's all I have. I'll
9 stop.

10 HEARING OFFICER FAY: Does the City have
11 any questions of the witness?

12 MR. SCHULTZ: Yes, I have two very brief
13 questions.

14 CROSS-EXAMINATION

15 BY MR. SCHULTZ:

16 Q From the PSA to the FSA you've included
17 under verifications many times that the City has
18 review and comment period, which we appreciate.
19 But I'd like to point you to CULTURAL-4, which
20 deals with the worker environment and awareness
21 training.

22 And the City would like to know if you
23 would include a review and comment period under
24 verification where the last sentence would be
25 added that would read, the project owner shall

1 provide a draft copy of the work environment
2 awareness training to the City of Morro Bay for
3 review and comment.

4 Want me to read that again to you?

5 (Pause.)

6 MR. REINOEHL: Currently CUL-4 doesn't
7 require review and comment on the part of CEC
8 Staff for the worker environmental awareness
9 training program. We don't have a problem if a
10 copy goes to the City for their review and
11 comment.

12 Like I said, at this point there is no
13 requirement on the part of the CEC to review and
14 comment -- program.

15 MR. SCHULTZ: But you wouldn't have a
16 problem with the City being able to review and
17 comment on that --

18 MR. REINOEHL: I have no problem with
19 that.

20 MR. SCHULTZ: Thank you. Then the only
21 other question I have is on page 2-38, and it's
22 just a clarification. And then CULTURAL-11, a
23 verification. After completion of the project,
24 project owner shall insure that the CRS completes
25 the CRR within 90 -- should there be days in

1 there?

2 MR. REINOEHL: Yes, very good, there
3 should be 90 days in there.

4 MR. SCHULTZ: Didn't know if it should
5 be months or years.

6 (Laughter.)

7 MR. SCHULTZ: Nothing further.

8 HEARING OFFICER FAY: Okay. Any
9 questions from the Coastal Alliance?

10 MS. CHURNEY: Yes, thank you.

11 CROSS-EXAMINATION

12 BY MS. CHURNEY:

13 Q Staff has cited on page 2.1-5 of exhibit
14 143 findings by a third party, a Mr. Brian Walton,
15 with respect to the peregrine falcon. And I'd
16 just like to confirm that cultural staff has not
17 studied the issue of the impacts of the plant on
18 the peregrine falcon, is that correct?

19 MS. TORRES: True.

20 MS. CHURNEY: And cultural staff has no
21 personal knowledge of any impacts on the peregrine
22 falcon, is that also correct?

23 MS. TORRES: I believe we went with
24 recommendations of our biology group, but we were
25 rather informal in discussing it with them.

1 MS. CHURNEY: And would it be fair to
2 say then that with respect to the impacts of the
3 plant on the peregrine falcon that would more
4 logically be left to biological staff to draw
5 conclusions?

6 MS. TORRES: I'm sure it's covered
7 extensively in biology.

8 MS. CHURNEY: Thank you.

9 HEARING OFFICER FAY: Anything further?

10 MS. CHURNEY: No further, thank you.

11 HEARING OFFICER FAY: Okay. Ms. Dunton.

12 CROSS-EXAMINATION

13 BY MS. DUNTON:

14 Q Yes, I wonder if I could direct some
15 questions to Rob Wood. Mr. Wood, in your capacity
16 at the Native American Heritage Commission have
17 you ever had any dealings with MOAs concerning
18 projects or burials?

19 MR. WOOD: The Commission has. I
20 personally haven't worked on any. And that would
21 be MOAs in terms of disposition of burials, yes.

22 MS. DUNTON: Okay. Do you have any
23 knowledge of these dealings at the Commission
24 where the MOAs interfered with the authority of
25 the Native American Heritage Commission being able

1 to enact Public Resources Code 5097.98 when
2 dealing with burials?

3 MR. WOOD: I don't know any specific
4 instance. I know that there is a gray area in the
5 law concerning the Commission's involvement with
6 the creation of burial grounds, yes.

7 MS. DUNTON: Are you aware with the MOA
8 between Duke Energy and the San Luis Obispo County
9 Chumash Council?

10 MR. WOOD: I'm aware of it, yes.

11 MS. DUNTON: Would you agree then that a
12 private agreement could supersede state law when
13 it comes to burial issues?

14 MS. DUNTON: I think that if that should
15 occur then we would have to get a reading from the
16 Attorney General to make a specific interpretation
17 of the Public Resources Code elements dealing with
18 that to see whether or not such an agreement did,
19 in fact, go against the law in terms of what the
20 Commission's duties and responsibilities are,
21 yeah.

22 MS. DUNTON: And, Mr. Wood, how do you
23 determine, or how do you see -- you said that you
24 ask different agencies when it does come to
25 monitoring that you recommend culturally

1 affiliated. How do you determine that? Or how do
2 they usually determine cultural affiliation?

3 MR. WOOD: It's usually based on
4 indigenous territory of the particular tribal
5 group. For example, in terms of pipelines or
6 fiberoptic lines, companies have changed monitors
7 when they move into different tribal territories.

8 MS. DUNTON: So it's based on previous
9 records of territory?

10 MR. WOOD: Based on a variety of
11 sources, being archeology, ethnohistory, history,
12 et cetera. The various tribal territories as
13 they're now interpreted having been established
14 throughout the state basically.

15 MS. DUNTON: Could it also be
16 established through genealogy?

17 MR. WOOD: Genealogy is also another
18 method, yes.

19 MS. DUNTON: Okay, thank you, Mr. Wood.
20 Mr. Reinoehl, after reading the conditions of
21 certification and being aware of the MOA that Duke
22 Energy has with the San Luis Obispo County Chumash
23 Council do you see where it might conflict in any
24 way when it comes to equal participation during
25 the project?

1 MR. REINOEHL: The MOA is an agreement
2 the Commission is not a party to. And our
3 conditions of certification address state law and
4 the concerns of all the parties, and ways in which
5 the Commission feels that, or Commission Staff
6 feels that would appropriately address everyone's
7 concerns.

8 MS. DUNTON: Okay. Would you -- how do
9 I want to put this -- if the conditions are
10 implicated, would the MOA be disregarded then?

11 MS. HOLMES: Just a question of
12 clarification. Are you asking whether or not the
13 Commission Staff would disregard the MOA? Or are
14 you asking whether or not the parties would?

15 MS. DUNTON: The parties would disregard
16 the MOA then, if it seemed like it would be -- the
17 way I see the MOA is that it gives certain
18 privileges to one native American group over
19 another native American group, so I don't see how
20 if Duke meets the conditions of certification,
21 which says they have to treat each group equally,
22 how will the MOA come into play with the
23 conditions of certification, if they have to treat
24 everyone equally?

25 MS. HOLMES: I'm just not sure that

1 that's within the scope of the staff's testimony.

2 Staff has recommended --

3 MS. DUNTON: Okay.

4 MS. HOLMES: -- conditions that require
5 equal treatment.

6 MS. DUNTON: Okay. But I'm just
7 wondering because it is part of -- it's in there.

8 HEARING OFFICER FAY: I'm not sure we
9 have a question before us right now.

10 MS. HOLMES: Well, originally the --

11 MS. DUNTON: Are the --

12 MS. HOLMES: -- question was how would
13 the parties, how would the SLOCCC and Duke, what
14 would they do in the event that there was a
15 conflict. And I think staff has testified that
16 they're recommending conditions that would apply,
17 regardless of whether there was a conflict.

18 HEARING OFFICER FAY: Does that address
19 your question, Ms. Dunton?

20 MS. DUNTON: I think so.

21 HEARING OFFICER FAY: Okay.

22 MS. DUNTON: That's all the questions I
23 have.

24 HEARING OFFICER FAY: Okay. Any
25 redirect, Ms. Holmes.

1 MS. HOLMES: Just two real quickly to
2 make sure this is clear.

3 REDIRECT EXAMINATION

4 BY MS. HOLMES:

5 Q Mr. Reinoehl, with respect to the
6 discussion we had just a moment ago, if there were
7 to be a conflict between the MOA and the
8 conditions of certification is staff recommending
9 that the conditions be modified to accommodate the
10 MOA in any way?

11 MR. REINOEHL: No, we're not
12 recommending that.

13 MS. HOLMES: Thank you. Mr. Wood,
14 earlier Ms. Dunton asked you a question about
15 burial agreements, and you stated that there's a
16 gray area of the law with respect to burial
17 agreements and the authority of the NAHC.

18 Does the NAHC currently have an
19 established policy or an office practice that
20 addresses this gray area?

21 MR. WOOD: Well, at this point when the
22 burial agreements -- but what the law basically
23 says is that a party may involve the Commission in
24 helping to prepare a burial agreement. And so
25 it's not specific as to whether or not there is a

1 requirement for that to happen.

2 But when the Commission is involved, the
3 Commission tries to insure that all interested
4 parties are signatories to that agreement.

5 MS. HOLMES: So it would be your
6 recommendation, to the extent that this issue is
7 covered in the Commission's decision, that NAHC
8 involvement be mandated?

9 MR. WOOD: That's correct.

10 MS. HOLMES: Thank you.

11 HEARING OFFICER FAY: Any follow up
12 within the scope of those questions? Okay. Thank
13 you, Ms. Holmes.

14 Now we'll move to Ms. Dunton's
15 presentation of evidence on cultural resources.

16 MS. DUNTON: Okay, I have two witnesses.

17 HEARING OFFICER FAY: Would the
18 witnesses please stand and be sworn.

19 (Pause.)

20 HEARING OFFICER FAY: Please stand and
21 be sworn.

22 Whereupon,

23 CLAY SINGER and JOHN BURCH
24 were called as witnesses herein, and after first
25 having been duly sworn, were examined and

1 testified as follows:

2 DIRECT EXAMINATION

3 BY MS. DUNTON:

4 Q Would you please both state your name
5 and spell it for the recorder, please.

6 MR. SINGER: My name is Clay Allen
7 Singer, S-i-n-g-e-r.

8 MR. BURCH: John Burch, B-u-r-c-h.

9 MS. DUNTON: Mr. Singer, are you the one
10 that prepared your testimony?

11 MR. SINGER: I am.

12 MS. DUNTON: Do you have any corrections
13 or additions to your testimony?

14 MR. SINGER: No.

15 MS. DUNTON: Are these true and correct
16 to the best of your ability?

17 MR. SINGER: They are.

18 MS. DUNTON: And they've already been
19 numbered so I don't have to ask for that.

20 Commission?

21 PRESIDING MEMBER MOORE: They already
22 were assigned numbers.

23 MS. DUNTON: Yes.

24 PRESIDING MEMBER MOORE: Right.

25 MS. DUNTON: Mr. Singer, would you

1 please summarize your testimony.

2 MR. SINGER: First, I agree with the
3 staff assessment of the Commission report --
4 excuse me, the Duke Energy report, conditions of
5 approval.

6 I also agree with the presented
7 mitigation plan with no modifications other than
8 the rotation of monitors being an unacceptable
9 idea.

10 I found that the report contained no
11 ethnographic information that I could deal with.
12 And it was very difficult to get to the
13 archeological information. All the reports were
14 categorized under the name of Duke Energy, and we
15 could not access those reports to find out how
16 complete or incomplete they were.

17 References to contemporary ethnological
18 studies and unpublished ethnohistoric information
19 such as the Herrington Notes, are not included in
20 the FSA report.

21 And finally, although the staff does not
22 appear to have had access to primary geological
23 and geoarcheological data, the overall conclusions
24 are valid with regard to the archeological
25 deposits.

1 My findings were that the staff did not
2 have access to complete and historical information
3 about the archeological deposits within and
4 adjacent to the project area.

5 That's basically my testimony.

6 MS. DUNTON: Mr. Singer, I forgot to ask
7 about your qualifications. Would you please tell
8 the Commission and staff your qualifications.

9 MR. SINGER: I am a native Californian,
10 born in Los Angeles in 1944. I have a bachelors
11 and a masters degree in anthropology from UCLA. I
12 completed my PhD course work and exams in 1978. I
13 left UCLA for a teaching position at California
14 State University Northridge. And founded my own
15 business firm in 1982.

16 I have been a paid consultant in
17 archeological work since 1965. My specialties are
18 primarily prehistory and pre-industrial
19 technology. I've worked basically all over
20 California and have worked with the Chumash Tribe
21 and other tribes since about 1965.

22 MS. DUNTON: Okay. Mr. Singer, after
23 hearing you summarizing your testimony, would you
24 then agree that if the applicant would have
25 provided more complete information that the FSA

1 could have been better written for the protection
2 of cultural resources during the proposed project?

3 MR. SINGER: Possibly.

4 MS. DUNTON: Have you read the FSA
5 conditions of certification?

6 MR. SINGER: I have.

7 MS. DUNTON: Given your background and
8 experiences are there any changes to the
9 conditions that you believe could be made in the
10 appendix A which has to do with the monitoring and
11 consulting?

12 MR. SINGER: I would suggest that prior
13 to the initiation of monitoring and construction
14 that Duke Energy solicit information from tribal
15 members who have information regarding the project
16 area.

17 Second, I would recommend that
18 monitoring be done as a team, that is native
19 Americans should not be rotated, because the
20 information will be interrupted, that is their
21 ability to deal with the archeological resources
22 that are there.

23 If the native American monitoring teams
24 discuss what's going on continuously, then they
25 will have a better idea of how to deal with things

1 as they come up.

2 MS. DUNTON: Thank you. Mr. Singer, in
3 your years of professional experiences what have
4 you learned about fill soils that are already part
5 of a project site?

6 MR. SINGER: As Mr. Reinoehl indicated,
7 secondary deposits, here referred to as fill
8 soils, have the capacity to yield cultural
9 information, archeological materials including
10 human remains.

11 In the last three years we've
12 encountered three different episodes where fill
13 soils moved from a nearby location did contain
14 human remains which could not be detected because
15 we don't know where they came from.

16 MS. DUNTON: So then you would agree
17 that all ground disturbance be monitored as
18 recommended in the FSA CULTURAL-1 through
19 CULTURAL-8 and CULTURAL-14?

20 MR. SINGER: At this particular
21 location, definitely.

22 MS. DUNTON: Mr. Singer, in your 40
23 years as a professional archeologist and an
24 authority on geoarcheology, maybe not an authority
25 but you're interested in geoarcheology, what have

1 you noticed about the relationship between an
2 archeological site and by nearby geological
3 features?

4 MR. SINGER: Archeological sites are
5 always related to geological features, and in this
6 particular situation we're dealing with a project
7 area that has multiple archeological deposits on,
8 in and around it. And I've never seen a
9 comprehensive study putting all that information
10 together into one comprehensive picture.

11 MS. DUNTON: Would you then agree that
12 Morro Rock, as a geological feature, and the one
13 that's very dominant in this area, could be
14 directly connected to the Duke Energy site?

15 MR. SINGER: I'm not certain how you're,
16 or what you're asking.

17 HEARING OFFICER FAY: Do you mean
18 culturally connected, or -- you're going to have
19 to be a little more specific.

20 MS. DUNTON: Yeah, culturally connected
21 to the site.

22 MR. SINGER: Well, the archeological
23 sites that were there before there was a power
24 plant are certainly connected to both the bay and
25 the rock. The bay is there, in part, because

1 there's a rock there. And the bay is there
2 because there are streams coming there. And the
3 populations that lived there are there because of
4 both of those things. And provided an environment
5 that was hospitable.

6 MS. DUNTON: Okay, Mr. Singer, in your
7 many years of experience in studies working with
8 many different Chumash Tribes, both on a
9 professional and personal level, have you ever
10 heard or read about Morro Rock being connected to
11 Chumash culture or mythology?

12 MR. SINGER: To culture, yes. To
13 mythology, no. I have never come across a single
14 reference in Chumash mythology to Morro Rock or
15 Morro Bay. I've spoken to a dozen individuals
16 from this area and none of them have related to me
17 specific mythological connections with Morro Rock
18 or Morro Bay.

19 MS. DUNTON: Do you know of any tribes
20 that are?

21 MR. SINGER: Mythologically connected?

22 MS. DUNTON: Um-hum.

23 MR. SINGER: The only one I'm aware of
24 are the Salinans.

25 MS. DUNTON: Okay, thank you. Do I ask

1 that his testimony be put as evidence now?

2 HEARING OFFICER FAY: Yes, you can move
3 his testimony at this time if you like.

4 MS. DUNTON: Okay, I'd like to move the
5 testimony.

6 HEARING OFFICER FAY: All right, is
7 there objection to receiving Mr. Singer's
8 testimony? I hear none, that will be received.
9 And just for reference that is exhibit 141. Did
10 you want to go ahead with your other witness now?
11 Or make them both available at once, or --

12 MS. DUNTON: Okay, that would be fine.

13 Would you, Mr. Burch, like to state your
14 qualifications?

15 MR. BURCH: Yes.

16 MS. DUNTON: Are you just a lay person?

17 MR. BURCH: No, I am qualified. I hold
18 a degree in cultural affiliation --

19 MS. DUNTON: Okay, --

20 MR. BURCH: -- with the proposed site
21 area.

22 MS. DUNTON: Okay, Mr. Burch, are you
23 the one that prepared your testimony?

24 MR. BURCH: Yes, I am.

25 MS. DUNTON: Do you have any corrections

1 or additions to your testimony?

2 MR. BURCH: No.

3 MS. DUNTON: So these are true and
4 correct as the best of your ability?

5 MR. BURCH: Yes, it is.

6 MS. DUNTON: Would you please briefly
7 summarize your testimony?

8 MR. BURCH: I have always had and have
9 been passed down to myself from my grandmothers
10 and other avenues of the religious aspect of this
11 project site.

12 I think due to my involvement and my
13 long integrity to this area I think my testimony
14 stands for itself, that I am more than qualified
15 to answer only specific questions.

16 MS. DUNTON: Okay, Mr. Burch, in your
17 testimony you mentioned that monitoring as a part
18 of mitigation does not solve the destruction of
19 spiritual places. What would your solution be?
20 What would you like to --

21 MR. BURCH: May I elaborate on this --

22 MS. DUNTON: Sure, elaborate --

23 MR. BURCH: -- for just a little bit.

24 MS. DUNTON: -- on it first.

25 MR. BURCH: Number one, there's been a

1 great deal of consideration for the monitoring.
2 There are presently two cultures that need
3 monitoring. If there is not one Salinan and one
4 representative from the Chumash culture to do the
5 monitoring then one culture is obviously being
6 overlooked at the time.

7 I know that the Salinan people are not
8 versed in Chumash culture, therefore they would be
9 no an appropriate replacement. We would only be
10 there to monitor and to ascertain our cultural
11 affiliation.

12 And I've forgotten the question.

13 (Laughter.)

14 MS. DUNTON: What would your solution be
15 other than --

16 MR. BURCH: Monitoring --

17 MS. DUNTON: -- destruction of a
18 spiritual place?

19 MR. BURCH: Monitoring is no way a
20 solution to watching your ancestors being brought
21 up, your culture being annihilated. It is not an
22 appropriate feasibility for any native American to
23 be paid or unpaid. It is simply not an objective
24 to allow a spiritual area to be tampered with
25 under any condition.

1 My solution would be, and I would be
2 able to offer the information that this is a
3 highly spiritual place due to the facsimile of
4 Morro Rock and its icons.

5 MS. DUNTON: So you agree --

6 MR. BURCH: My only solution would be to
7 help empower the Commission to simply pass the
8 proposed project to find a new location.

9 MS. DUNTON: Okay. Have you ever been
10 compensated at all for all your devotion
11 concerning cultural protection?

12 MR. BURCH: No, I have never been
13 compensated for that.

14 MS. DUNTON: And would you accept any
15 compensation for the destruction of spiritual
16 places?

17 MR. BURCH: I could not accept any
18 compensation for that.

19 MS. DUNTON: Mr. Burch, with your
20 experiences as an MLD appointed by the Native
21 American Heritage Commission have you ever seen
22 how MOAs can interfere in the state's authority to
23 uphold the Public Resources Code 5097.98 when
24 dealing with burials?

25 MR. BURCH: Yes, there was a recent

1 event over at Santa Margarita Ranch.

2 MS. DUNTON: Okay, we're not supposed to
3 say any locations. But you have had experiences
4 where the law could not --

5 MR. BURCH: The law couldn't help us and
6 we were put on the street, yes.

7 MS. DUNTON: Mr. Burch, have you read
8 the FSA conditions of certification dealing with
9 monitoring?

10 MR. BURCH: Yes, I have.

11 MS. DUNTON: And I believe we've already
12 heard your recommendations. But would you agree
13 to the simultaneous monitoring?

14 MR. BURCH: If there's no other avenue,
15 and if this project must go through, and I have no
16 other avenue left to explore, yes, I would have to
17 agree.

18 MS. DUNTON: Mr. Burch, with your
19 experiences as a nonpaid cultural resource
20 consultant, what have you noticed concerning fill
21 soils at project sites?

22 MR. BURCH: They do contain mysteries.

23 MS. DUNTON: So would you go with the
24 staff's recommendations then as mentioned in
25 CULTURAL-1 through CULTURAL-8 and CULTURAL-14,

1 that all ground disturbance be monitored?

2 MR. BURCH: I would strongly suggest it.

3 MS. DUNTON: Are you aware of any
4 mythology ties that tie the Chumash people to
5 Morro Rock?

6 MR. BURCH: No, I'm not.

7 MS. DUNTON: Mr. Burch, as a person who
8 practices at the top of the rock, how do you feel
9 about the FSA's assumption that because the
10 proposed plant is supposed to be quieter than the
11 existing one, that there will be no impact to
12 noise?

13 MR. BURCH: There could only be a new
14 noise. Therefore, it will still impact.

15 MS. DUNTON: So the times that you've
16 been up there you've noticed that the power plant
17 is very loud?

18 MR. BURCH: It's extremely disturbing.

19 MS. DUNTON: In your opinion what is
20 your spiritual evaluation of the proposed project
21 site?

22 MR. BURCH: In my opinion the proposed
23 project site is of extreme spiritual value.
24 Spiritual meaning religious and significant.
25 During the four seasons, in one of the ceremonies

1 at the top of the rock has to do with the winter.
2 The winter has always been known and in reference
3 to taking of the weak, taking of the not
4 healthiest, leaves go to sleep, trees go to sleep,
5 things hibernate.

6 That ceremony in itself, with the
7 equinox of the winter, casts a very specific
8 shadow from the rock onto the project site,
9 itself, which gives the project site, itself, an
10 extreme religious significance.

11 And to propose they site a project in
12 that location violates the religious rights of
13 those that are resting there. The Bible states
14 rest in peace. The Native American Religious
15 Freedom Act, federal law, is now in place. I do
16 not think that that avenue has been explored.
17 Those people have a right to rest where they are
18 as human beings. And not to be resurrected -- to
19 be brought back by a D9 or any other tractor.
20 They have a right to be there and rest there.

21 They were placed there by their
22 religious philosophy. And I feel strongly that
23 their religious philosophy is being violated by
24 the sheer proposal of this project.

25 MS. DUNTON: So that pertains to the

1 modernization project location or the existing
2 power plant location?

3 MR. BURCH: They both fall in the shadow
4 that falls there on the winter solstice. And they
5 were placed there so the icons and the power of
6 Morro Rock will protect them.

7 MS. DUNTON: Okay, Mr. Burch, how do you
8 feel about Duke's recommendations of inclusion of
9 photos in the project?

10 MR. BURCH: When someone is uncovered
11 after they've been resting for thousands of years,
12 hundreds of years, they usually turn up naked,
13 unable to shield their innocence. They should not
14 be allowed to display any part of them in any way,
15 shape or form.

16 MS. DUNTON: So you would be against any
17 photos of human remains?

18 MR. BURCH: Yes.

19 MS. DUNTON: But how about photos of
20 other cultural objects?

21 MR. BURCH: The other cultural objects
22 can only speak for themselves. I do disagree
23 because of the significance and religious value of
24 this place that there will be religious objects
25 come up. And if there are pictures available

1 people tend to counterfeit objects and turn them
2 into the blackmarket for sale.

3 MS. DUNTON: So any photos or any
4 objects, this would have to be mitigated before
5 any photos would be taken of any objects?

6 MR. BURCH: They should ask an Indian
7 first, yes.

8 MS. DUNTON: Are you aware of any
9 burials that are presently at the coroner's office
10 that are from the Duke Energy site?

11 MR. BURCH: Yes, I am.

12 MS. DUNTON: Would you be -- what would
13 you like to see, because we know there's other
14 burials out there from the Duke Energy site. What
15 would you like to recommend, or what would you
16 like to be considered into the conditions of
17 approval for the project, be done with these other
18 burials that were taken from the Duke Energy site?

19 MR. BURCH: That they be brought back,
20 and that Duke would be in agreement to that
21 bringing back.

22 MS. DUNTON: Okay, I'm through with Mr.
23 Burch. I'd like his testimony entered into
24 evidence, please.

25 HEARING OFFICER FAY: Is there any

1 objection to receiving exhibit 142 into evidence?

2 I hear none, so that is moved at this point.

3 Are the witnesses available for cross-
4 examination?

5 MS. DUNTON: Yes.

6 PRESIDING MEMBER MOORE: Let me start
7 out, I've got a question for Mr. Singer.

8 Mr. Singer, at the last part of your
9 letter you say: Finally, although the staff does
10 not appear to have had access to primary
11 geological and geoarcheological data, their
12 overall conclusions are valid.

13 Do you stand by that?

14 MR. SINGER: Yes.

15 PRESIDING MEMBER MOORE: So whether or
16 not there were flaws in what you consider to be
17 basic research, you believe that what the staff
18 arrived at, in fact, fairly represented the site?

19 MR. SINGER: Correct.

20 PRESIDING MEMBER MOORE: Thank you.

21 HEARING OFFICER FAY: Okay, Mr. Ellison,
22 any questions?

23 MR. ELLISON: No, we have no cross-
24 examination. Let me say one thing, which is that
25 the rules of this proceeding and the practice of

1 the parties have been to confine direct testimony
2 to that which was prefiled.

3 And I think there's been some testimony
4 here that went quite a bit beyond what was
5 prefiled. We're going to waive any objection to
6 that in this particular circumstance.

7 But I wanted to make that statement, I
8 wouldn't want to see this become a practice as we
9 continue further in the proceeding. But in this
10 particular case, on this particular issue, with
11 this particular party we're going to waive our
12 objection.

13 HEARING OFFICER FAY: Okay, duly noted.
14 Ms. Holmes.

15 MS. HOLMES: No questions.

16 HEARING OFFICER FAY: The City?

17 MR. SCHULTZ: No questions.

18 HEARING OFFICER FAY: How about the
19 Coastal Alliance?

20 MS. CHURNEY: No questions.

21 HEARING OFFICER FAY: No questions.

22 Well, we're going to break for dinner. I think
23 there will be some dinner available in the next
24 room, perhaps not till 5:00.

25 But we will return and take public

1 comment at 6:00.

2 Because we have a large contingent of
3 witnesses waiting to testify on air quality, and
4 we do have to go into the evening, we may have to
5 limit the time for public comments.

6 Can I see a show of hands of how many
7 people wanted to make a comment about cultural
8 resources? Okay, it probably won't be too much of
9 a problem then.

10 So we'll come back at 6:00.

11 (Whereupon, at 4:52 p.m., the hearing
12 was adjourned, to reconvene at 6:00
13 p.m., this same evening.)
14
15
16
17
18
19
20
21
22
23
24
25

1 EVENING SESSION

2 6:05 p.m.

3 PRESIDING MEMBER MOORE: Mr. Fay has
4 hoarded the blue cards, I'm the last one to see
5 them. And he'll call on you and ask you to come
6 up to this microphone right up here.

7 HEARING OFFICER FAY: Or if you need a
8 table, you're welcome to use the witness stand --

9 PRESIDING MEMBER MOORE: Right, you can
10 use the witness stand --

11 HEARING OFFICER FAY: -- here. We have
12 to have you on mike.

13 PRESIDING MEMBER MOORE: But you have to
14 be speaking into the microphone and you have to
15 give us your name. And if it's an unusual name,
16 and you will know that better than we will, spell
17 it for our scribe. And with that, we're off.

18 HEARING OFFICER FAY: Okay. And please
19 also mention your affiliation if you have one that
20 you'd like us to be aware of.

21 (Pause.)

22 PRESIDING MEMBER MOORE: Okay, let's
23 invite you to come back over to the table over
24 here, and see if you can use that one.

25 (Pause.)

1 MS. COLLINS: Thank you. My name is
2 Tarren T-a-r-r-e-n Collins. I'm the attorney for
3 the San Luis Obispo County Chumash Council. I'd
4 also like to introduce Mark Vigil, who's the Chief
5 of the San Luis Obispo County Chumash Council.

6 And on behalf of the other 3000 Chumash
7 descendants, which this Council represents, I make
8 the following statement.

9 The San Luis Obispo County Chumash
10 Council opposes development of any sort.
11 Especially in areas that may contain sacred sites.
12 Recognizing that some development may be
13 inevitable, however we feel that it's best done in
14 previously disturbed areas such as the tankfarm
15 project site proposed by Duke Energy.

16 At our request Duke Energy agreed to,
17 and did, conduct additional archeological surveys
18 and geoarcheological surveys of the power plant
19 lands. No known burial sites or cultural
20 resources will be impacted by the proposed
21 modernization.

22 We have requested, and Duke has agreed,
23 to conduct a subsurface survey as the tankfarm
24 demolition work takes place.

25 HEARING OFFICER FAY: Tarren, I'm sorry

1 to interrupt you. We have your statement, and it
2 will go in the record. Can you summarize it for
3 us?

4 MS. COLLINS: Certainly. Well, I can
5 try. Basically the Chumash Council entered into
6 the memorandum of agreement because Duke agreed to
7 protect the site in a fashion that no other
8 development in this County or near vicinity has
9 agreed to do. Duke going above and beyond the law
10 in protecting the site.

11 I've also been asked to portray on
12 behalf of the Council, and I feel more comfortable
13 reading it, if you don't mind, because it's
14 actually their words put together, so I'd prefer
15 not to summarize.

16 I'll continue back on. It was the
17 decision of the Council after long and difficult
18 discussions on this issue, and after many months
19 expressing our concerns during meetings with Duke
20 Energy, to enter a memorandum of agreement with
21 the company.

22 Duke Energy has shown that they have a
23 genuine understanding of our great concerns for
24 the protection of our sacred sites and burial
25 grounds. And the agreement reflects the

1 willingness of the owners of the land to
2 accommodate these concerns.

3 The San Luis Obispo County Chumash
4 Council has, with Duke's knowledge, put a great
5 deal of effort into seeking input from other
6 native American groups. The native American
7 groups need to resolve the disagreements between
8 them, away from the government process.

9 It is not the place of government, no
10 matter how well intentioned, to make decisions for
11 our people.

12 The San Luis Obispo County Chumash
13 Council has sought meetings with the Salinans and
14 other groups and has determined to resolve any
15 boundary dispute. The SLOCCC has initiated steps
16 to accomplish this critical task and looks forward
17 to continuing to work with Rob Wood of the Native
18 American Heritage Commission.

19 In the event that the boundary dispute
20 is resolved in favor of the Chumash, as we
21 anticipate, after review of all available
22 evidence, then we propose that the CEC condition
23 CULTURAL-14 be modified as follows:

24 After the first paragraph on CULTURAL-
25 14, insert the following sentence: "In the event

1 that the current boundary dispute between the
2 Chumash Nation and the Salinan Nation is resolved
3 in favor of the MBPP project area being solely
4 Chumash territory in prehistoric times, then Duke
5 will not be required to include the Salinan Nation
6 in any monitoring or consultation, nor include
7 them by incorporating their comments concerning
8 any aspects of the project, including curation in
9 the final CRR required by cultural resources
10 condition number 11."

11 We ask that the CEC honor the process
12 and agreement we forged with Duke Energy and will
13 provide the best protection of any local
14 development project to date for construction near
15 sacred native American burials and sacred sites.

16 We give respect to Duke Energy on issues
17 of native American concern, and the fact that they
18 have given us the opportunity to address these
19 issues.

20 We acknowledge the fact that Duke has
21 committed to protection as stated in the terms of
22 our memorandum of agreement. We ask the CEC to
23 honor this commitment by not requiring conditions
24 of approval that mandate Duke to implement a
25 process that is less protective of cultural

1 resources than would be achieved by the MOA.

2 CULTURAL-14 requires rotation of various
3 groups on a weekly basis. That will create a
4 break in continuity of cultural resources
5 monitoring that would be detrimental to the
6 protection and preservation of these resources.

7 We continue to support the inclusion of
8 other native American groups by providing them
9 opportunities to receive periodic updates from the
10 project archeologist.

11 At the very least because of the
12 requirement to rotate cultural resources
13 monitoring is disfavored by all concerned native
14 American groups because of the break in
15 continuity, as well as concerns over the
16 traditional cultural differences between these
17 groups, we propose that the CEC require the
18 representatives of the native American groups with
19 traditional ties to the area not rotate, but
20 instead be present together to participate during
21 the cultural resources monitoring required by the
22 CEC.

23 We therefore propose that amendment A --
24 appendix A entitled cultural resources -- you can
25 read that in your draft -- be modified as follows:

1 "The project owner shall offer to each group the
2 opportunity to participate in cultural resources
3 monitoring/consulting during ground disturbance of
4 the MBPP.

5 And then delete the first sentence of
6 paragraph 2, replace it with the following: "Each
7 group shall be allowed to send one representative
8 who will be known as the lead monitor/consultant
9 reporting to the CRS.

10 The next few sentences remain the same.
11 Then the next-to-the-last sentence in this
12 paragraph should be changed to remove the
13 references to alternating basis. And the last
14 sentence should be deleted to that reference, so
15 that the end of paragraph 2 shall read:

16 "Native American monitoring/consulting
17 shall occur during ground disturbance as required
18 in the conditions of certification, giving each
19 concerned native American group an opportunity to
20 have a representative onsite under the direction
21 of the CRS or CRM.

22 I've handed you staff those
23 modifications so that they might be incorporated
24 and amended into the FSA conditions of approval.

25 Again, we must thank Duke for allowing

1 the local Chumash descendants to continue to
2 participate in the protection of the concerns that
3 we hold sacred and of great importance to us.

4 I'd now like to ask if Mark Vigil has
5 any comments. I know he submitted a card.

6 CHIEF VIGIL: Yeah, I have two comments
7 I'd like to make. One of them is I'd like to --

8 HEARING OFFICER FAY: Just a moment,
9 Mark. I've got to ask people to please turn your
10 phones off. It's very disruptive of the hearing.
11 You know, we're here to do this job. If you have
12 to take phone calls, please go outside and do it
13 out there.

14 I'm sorry, go ahead.

15 CHIEF VIGIL: That's all right. And the
16 Chumash second the motion. Thank you.

17 (Laughter.)

18 CHIEF VIGIL: You know, we've worked
19 very hard to get this thing in progress here, this
20 memorandum of agreement. It isn't something that
21 was just put together in a few hours. We worked a
22 year and some on this.

23 And as you people know, we expressed
24 this to Duke, that our concerns -- where our
25 concerns were. And pleaded with them a little bit

1 and showed them and brought them up to date what
2 certain areas mean to the Chumash and other native
3 Americans.

4 And that as you all know that Duke does
5 not have to sign an MOA with anybody. They don't
6 even have to have us even present on their site
7 location. And I'd kind of like to just thank them
8 for it.

9 And one of the things that we're not for
10 is development. And I think the place where it is
11 right now would probably be better than, and maybe
12 make another plant, and maybe disturb another
13 culture site.

14 But that's all I have to say this
15 evening. And thank you folks for listening.

16 HEARING OFFICER FAY: Thank you. Tracey
17 Dunton.

18 MS. DUNTON: My name is Tracey Dunton.
19 Last name D-u-n-t-o-n. And I am a member of the
20 Salinan Tribe. And before I get started I'd like
21 to commend the CEC Staff for what they have done
22 working with the Salinan Indians.

23 And first of all I want to agree with
24 the FSA's conditions and certifications,
25 especially that all ground disturbances be

1 monitored. I disagree with Duke's recommendations
2 that only native fill be monitored.

3 My reason for deciding this is my
4 experience as a cultural resource consultant is
5 that I know for a fact that you can find
6 prehistoric artifacts and human remains in
7 previously disturbed soils and fill material.

8 The last thing I'd like to say is that
9 the FSA wants to alternate monitoring weekly
10 between tribes. I disagree with this very
11 strongly. There should be at least one
12 representative onsite from the Salinan Tribe and
13 Chumash Tribes whenever there is ground
14 disturbance.

15 Thank you.

16 HEARING OFFICER FAY: Thank you. Roxann
17 Souza.

18 MS. SOUZA: My name is Roxann Souza; I
19 am a Salinan native. I grew up in Cayucos.
20 Although I am a Salinan Tribal applicant, I am
21 speaking this evening as an individual.

22 I want to thank everyone who is
23 participating in this process for all your
24 interest, time and input. I am confident that the
25 Commission will base their decision on the facts,

1 the laws and what is true. And I thank you for
2 that.

3 I want to state emphatically that I
4 support John Burch in his assertion that the best
5 solution is that this project not go forward. It
6 is my belief that the rock, including the
7 surrounding area, especially the proposed site of
8 the Duke Energy construction, is a very sacred
9 place. The rock is prominent in our Salinan
10 legends and the proposed construction site is
11 sacred to our people.

12 I believe that any further desecration
13 to the site is in violation of laws that protect
14 native American sacred and ceremonial sites. I
15 leave it to those more qualified to tell you the
16 specific laws.

17 So, first and foremost, it is my strong
18 desire that this proposed project not go forward.
19 We will better spend our energy coming together to
20 heal this sacred area and learn the mysteries it
21 has to teach us.

22 My primary goal is to protect the
23 integrity of our sacred sites; and that always
24 includes protecting our ancestor remains from
25 disturbance of any kind.

1 Having said that, if the proposed
2 project does go forward, I want to state that I
3 support the recommendations of the staff. I agree
4 with and support all statements made by John Burch
5 and Clay Singer. I want monitors from both the
6 Salinan and the Chumash Tribes to be present
7 during all phases of construction, if construction
8 must occur.

9 I am especially concerned about the
10 proposed use of the phrase native soil ground
11 disturbance in place of ground disturbance. To
12 suggest that construction take place in an area
13 where ancestor remains were horribly violated and
14 desecrated during the original construction is
15 both unacceptable and offensive. And I ask you
16 that this not occur.

17 Thank you very much for listening.

18 HEARING OFFICER FAY: Thank you for your
19 comment. Bonnie Pierce.

20 MS. PIERCE: Hello, I'm Bonnie Pierce.
21 I am the Salinan Tribal Council Representative.
22 There's actually eight Council Members here
23 tonight, and our Elders, also. If you'd just
24 stand, the Council. Because actually I represent
25 the whole Tribe. There's close to 1000 of us from

1 Monterey County San Luis Obispo.

2 More importantly, all of the Council
3 Members that you see here tonight are actual blood
4 lineal descendants to the actual cultural site of
5 Duke Energy now rests on.

6 So we want to -- although our first
7 preference would be to leave our ancestral burial
8 sites alone, with no further construction, we also
9 recognize that progress is a way of America.

10 As we respect our ancestors, but do not
11 worship their remains, we want to clarify that the
12 Salinan Tribe, as a whole, is not opposed to Duke
13 Energy's expansion with the inclusion of the
14 California Energy Commission's recommendations.

15 We believe our Salinan Tribe's monitor
16 can work effectively with the Chumash and/or other
17 native American monitors in a team spirit for the
18 protection of this most important cultural site.

19 We do have the Salinan Heritage
20 Consultants, SHC, which is our monitoring
21 business, which is both paid and voluntary work
22 through that, with the appropriate licenses and
23 insurances. And we would not object to any
24 agreements between Duke Energy if that would help
25 make them feel better about how we do our

1 monitoring business.

2 We also have our tribal MLDs that do
3 have proven blood lineal ties to the cultural
4 site, and our registry with Native American
5 Heritage Commission. Rob Wood is very familiar
6 with us.

7 So we just want to let you know that
8 boundary disputes are one thing; protection of our
9 sites is the most important matter here for us.
10 And for us to be able to come in to this and to
11 work with the Chumash, Santa Ynez Band, whoever
12 those may be, we want that in a real team spirit.
13 And that's what we're asking for. We'd like to
14 submit our Salinan Tribal Council name so that you
15 would know who the contacts are for information.
16 That would lead you to our monitoring site or any
17 other information.

18 Included in our Tribal Council is Patti
19 Dunton and John Burch. As you recognize, Salinan
20 Tribal people can come here as individuals because
21 that's the right of everybody to come and speak.
22 We speak as also Council, so that includes them in
23 this statement.

24 So, we'd like to thank Duke Energy and
25 the California Energy Commission.

1 HEARING OFFICER FAY: Thank you for your
2 comment. David Nelson.

3 MR. NELSON: Hi, my name is David
4 Nelson. I'm a resident of Morro Bay. I've lived
5 in the area for about 22 years. And I just want
6 to echo what Mr. Burch testified to.

7 This Morro Bay site is considered a
8 brownfield by the Energy Commission because
9 there's a power plant there. But, you know, the
10 rules and regulations that are in effect now
11 weren't in effect back in the '50s when they
12 started this. And I have witnessed the
13 photographs that were taken of the graves that
14 were opened.

15 And I'm not a native American, but I
16 feel passion toward this. That the people that
17 lived there before, and we're talking even before
18 they built pyramids, there were people here
19 living. And it's all covered over there.

20 And to not know what you're drilling
21 into, they're talking 2000 pylons going 35 feet
22 into the unknown. And we're supposed to believe
23 nothing, no remains will be found.

24 But history shows around, they started
25 at the high school digging a little field and the

1 first scrape they took they found bones. Where
2 they put the three and four generators on that
3 site, our natural history museum has photographs
4 of remains.

5 There are remains everywhere. I hope
6 you understand the sacredness of this site. Like
7 I say, I'm not a native American, but if my
8 ancestors were being dug up and built over with
9 construction that isn't really necessary to be put
10 there, I'd be really upset.

11 I think these people are showing great
12 restraint in their testimony and their pleas for
13 mercy to this ground. I mean this is sacred land.
14 I just hope you realize that it's not just a
15 brownfield, it's so much more than a brownfield.

16 And everybody should see that, realize
17 it, and see what it's worth, what the real true
18 value is spiritually. You can't put money value
19 on this. You can't, you just can't. It's bigger
20 than what we are. And I hope that you see the
21 importance of this land.

22 It touches me. This rock is a symbol in
23 my mind. You know, after a long journey across
24 America this rock struck me. And I didn't know
25 why. But after seeing what's there, and knowing a

1 little bit of the history of it, it's a touching
2 place. And it's important, and it should be
3 saved.

4 And there's other ways to produce energy
5 other than on this particular site. You could
6 even put these new generators into the old
7 facility and not disturb anything else on this
8 site.

9 Thanks.

10 HEARING OFFICER FAY: Thank you.

11 (Applause.)

12 HEARING OFFICER FAY: So we've gone
13 through all the blue cards now. And I assume
14 we've concluded the public comment on cultural
15 resources.

16 CHIEF VIGIL: I have a comment to make
17 here this evening. I'm going to say it loud
18 enough I don't need a mike to say it.

19 Please, if you people have locations of
20 where you know there's sites at, please don't
21 bring it up location-wise. It just opens the
22 doors for pot hunters. I'd appreciate it. Thank
23 you very much.

24 HEARING OFFICER FAY: Thank you. And
25 now that concludes our taking of evidence on

1 cultural resources and the comment period on that.
2 And we're going to take a real short break while
3 people shift seats. We're going to move into air
4 quality.

5 (Brief recess.)

6 PRESIDING MEMBER MOORE: We're going
7 back on the record and we're going to take up the
8 topic of air quality. And we're going to turn to
9 the applicant and ask you to introduce your team.
10 If anyone needs to be sworn you can so instruct
11 us.

12 MR. ELLISON: Thank you. We will be
13 doing public health and air quality together.
14 We'd like to start with air quality. Our
15 witnesses are Gary Rubenstein and Dr. Eric
16 Walther. Dr. Walther has previously been sworn,
17 but I'd ask that Mr. Rubenstein be sworn.

18 HEARING OFFICER FAY: Would you please
19 swear the witness.
20 Whereupon,

21 GARY RUBENSTEIN
22 was called as a witness herein, and after first
23 having been duly sworn, was examined and testified
24 as follows:

25 MR. ELLISON: Thank you.

1 DIRECT EXAMINATION

2 BY MR. ELLISON:

3 Q Would you again state your name for the
4 record, please.

5 MR. RUBENSTEIN: My name is Gary
6 Rubenstein.

7 MR. ELLISON: And what subject matter
8 testimony are you here to sponsor today?

9 MR. RUBENSTEIN: I'll be testifying with
10 respect to air quality and supporting Dr.
11 Walther's testimony with respect to public health.

12 MR. ELLISON: Were the documents that
13 are making up your testimony previously identified
14 in your prefiled testimony?

15 MR. RUBENSTEIN: Yes, they were.

16 MR. ELLISON: Are those beginning on
17 page 118 are the following numerous exhibits,
18 exhibit 4, exhibit 5, 6, 7, 8, 12, 14, 19, 22, 26,
19 29, 32, 33, 34, 37, 38, 42, 44, 45, 126, 127, 52,
20 55, 128, 129, 130, 88, 90, 91 and 93, is that
21 correct?

22 MR. RUBENSTEIN: I'm afraid so.

23 (Laughter.)

24 MR. ELLISON: Thank you. Now, do you

25 //

1 have any changes or corrections to your testimony?

2 MR. RUBENSTEIN: No, I do not.

3 MR. ELLISON: Were these documents
4 prepared either by you or at your direction?

5 MR. RUBENSTEIN: Yes, they were.

6 MR. ELLISON: Are the facts stated
7 therein true to the best of your knowledge?

8 MR. RUBENSTEIN: Yes, they are.

9 MR. ELLISON: Are the opinions stated
10 therein your own?

11 MR. RUBENSTEIN: Yes, they are.

12 MR. ELLISON: And do you adopt this as
13 your testimony for this proceeding?

14 MR. RUBENSTEIN: Yes, I do.

15 MR. ELLISON: Could you please review
16 your qualifications for the public and the
17 Committee?

18 MR. RUBENSTEIN: Yes. I have a bachelor
19 of science degree in engineering from CalTech.
20 Subsequent to my graduation I worked for the
21 California Air Resources Board as an engineer
22 through 1981.

23 When I left the Air Resources Board in
24 1981 I was the Deputy Executive Officer for
25 Technical Programs. My responsibilities included

1 evaluation of air quality impacts of a variety of
2 different types of energy facilities.

3 I left the Air Resources Board in 1981
4 to co-found Sierra Research where I remain today.
5 At Sierra Research I have principal responsibility
6 for the firm's activities related to industrial
7 sources of air pollution of various types,
8 including power plants.

9 While with Sierra Research I have
10 participated in a number of Energy Commission
11 siting proceedings. In my testimony are listed 21
12 different projects totaling over 12,000 megawatts
13 of generation that I participated in over the last
14 20 years.

15 MR. ELLISON: Thank you. I'd like to
16 turn now to your testimony. Could you please
17 provide a short summary of your testimony and the
18 conclusions that you reached regarding local and
19 regional air quality issues?

20 MR. RUBENSTEIN: Yes. Our analysis of
21 the project's air quality impacts covered the
22 construction of the project, including the
23 tankfarm demolition, the demolition of the
24 existing facility and operation of the new power
25 plant.

1 In performing our analysis we had to be
2 sure that the project would be safe, both on a
3 local level and on a regional level.

4 Our analysis of the local impacts of the
5 project focused on three areas. The first area
6 was that we had to make sure that the project used
7 the best available pollution control technology.
8 The project is, in fact, designed to use advanced
9 combusters which minimize the formation of
10 pollutants.

11 And in addition to using these advanced
12 combusters, the project uses catalytic converters
13 analogous to the catalytic converters that we have
14 on our cars to control both oxides of nitrogen and
15 carbon monoxide.

16 That combination of technologies, in my
17 opinion, represents the best available control
18 technology. And both the staff assessment and the
19 Air District's final determination of compliance,
20 I believe, concur in that conclusion.

21 The second aspect of our analysis
22 regarding local impacts includes our air quality
23 impact analysis. That's an analysis where you
24 take a look at the effect of the project on air
25 quality within the vicinity of the project.

1 The analysis that we performed is a very
2 conservative one. It's conservative in that we
3 use models approved by the U.S. Environmental
4 Protection Agency that are deliberately intended
5 to overstate the project impacts.

6 In addition, we take a look at those
7 operating conditions for the plant that represent
8 the worst case. On top of that we take a look at
9 emission rates from the plant that represent the
10 worst case. And finally, we look at weather
11 conditions that cover the full range of conditions
12 we see here at Morro Bay and make sure that the
13 impacts are acceptable even under worst case
14 weather conditions.

15 The extent of the conservatism in our
16 analysis reaches so far as to provide for the fact
17 that we assume, for example, that the emissions
18 from the turbines at the plant are equivalent to
19 those turbine emission rates under extremely cold
20 conditions, 34 degrees ambient temperature. And
21 we assume in some of our analyses that those
22 temperatures prevail throughout the entire year.

23 And while the worst case weather
24 conditions for dispersion may occur at warmer
25 conditions, we nonetheless assume the worst case

1 emission rate, the worst case operations and the
2 worst case weather conditions all occur at the
3 same time, even if that's not physically possible.

4 As a result of that, I am extremely
5 confident that our estimates of the project's
6 impacts substantially overstate what the true
7 impacts will be.

8 The third aspect of our analysis of the
9 project on the local area is the health risk
10 assessment. Dr. Walther will talk more about the
11 risk assessment in a few minutes.

12 Our portion of that analysis included
13 the development of emission factors and the
14 performance of the modeling analysis to make sure
15 that the project's impacts will be safe under all
16 operating conditions, under all weather
17 conditions, at all locations, at any time.

18 MR. ELLISON: Now I'll ask you to turn
19 to the issue of regional impacts in your analysis
20 there.

21 MR. RUBENSTEIN: Our analysis of the
22 regional impacts of the project also has three
23 elements.

24 The first element is also to insure that
25 the project uses the best available pollution

1 control technology. The best way to minimize the
2 impact that a project anywhere has on a region's
3 air quality is to make sure that it's as clean as
4 possible. And by insuring that the project uses
5 best available control technology, we have done
6 that.

7 The second aspect of our regional
8 analysis is a cumulative air quality impacts
9 analysis. And in that analysis we take a look at
10 what the project's impacts are in addition to the
11 impacts caused by sources already here in the
12 community. And make sure that those impacts are
13 within all state and federal air quality
14 standards.

15 The third aspect of our regional
16 analysis has to do with emissions offsets.
17 Emissions offsets are probably one of the most
18 misunderstood aspects of the emission control
19 program. Emissions offsets are not intended to
20 provide any local benefits. Sometimes they do,
21 but that's not the purpose of the program.

22 The purpose of the program is to make
23 sure that we can provide for the orderly
24 development of new sources of pollution, whether
25 it's a power plant such as this, or a dry cleaner

1 or almost any other type of source, and insure
2 that the emissions increase associated with that
3 source is counter-balanced by a decrease in
4 emissions from some other source.

5 The decrease does not necessarily have
6 to occur at the same time. And, in fact, under
7 District regulations the decreases in emissions
8 have to occur some time prior to the start of a
9 new source. And the decreases don't have to occur
10 at exactly the same location.

11 Again, the offset program is a regional
12 program, and the offset program is not a
13 replacement for insuring that a project is safe
14 and doesn't have local air quality impacts.

15 We have to demonstrate that the project
16 is safe on a local level, and then in addition to
17 that, we have to provide offsets as our
18 contribution to cleaning up air quality on a
19 regional basis.

20 MR. ELLISON: I want to turn now to a
21 summary of your overall findings. Can you briefly
22 summarize those findings for the Committee?

23 MR. RUBENSTEIN: Yes. Our analysis
24 concluded that the project will comply with the
25 San Luis Obispo District's regulations, and will

1 be in compliance with all laws, ordinances,
2 regulations and standards.

3 And, in addition, that the project will
4 not result in any unsafe air quality levels under
5 any operating conditions at anytime under any
6 weather conditions at any location.

7 MR. ELLISON: So, again, both the final
8 staff assessment and the final determination of
9 compliance, in terms of impacts, found no
10 significant impacts. Do you agree with the
11 findings of the Energy Commission Staff and the
12 local Air District?

13 MR. RUBENSTEIN: Yes, I do.

14 MR. ELLISON: And, again, both the local
15 Air District and the Energy Commission found
16 complete compliance with LORS, laws, ordinances,
17 regulations and standards. Do you concur with
18 that finding, as well?

19 MR. RUBENSTEIN: Yes, I do.

20 MR. ELLISON: So, let's turn now to the
21 conditions of certification that are set forth in
22 the final staff assessment. I understand that
23 with one exception you are in agreement with those
24 conditions.

25 Would you please describe your testimony

1 in that regard.

2 MR. RUBENSTEIN: Yes. The only
3 condition that we take exception to is a portion
4 of condition AQC-3. And that's the condition that
5 requires, among other things, that Duke monitor
6 ambient concentrations of nitrogen dioxide and
7 PM10 during project construction.

8 There is a separate monitoring
9 requirement that has been imposed by the San Luis
10 Obispo Air District during project operation, and
11 we're not taking issue with that.

12 The requirement we are taking issue with
13 is solely the one related to project construction.

14 My concern with that condition is that
15 the impacts associated with project construction
16 are temporary in nature. They are, as I indicated
17 earlier, grossly overstated due to the
18 conservatism built into the modeling analyses.

19 And in addition, these impacts occur,
20 the worst case impacts in particular, occur
21 generally within the confines of the PG&E
22 substation that's immediately adjacent to the
23 power plant.

24 I don't believe that construction would
25 result in any measurable impacts at any other

1 locations with the possible exception of within
2 the PG&E substation. And consequently, I don't
3 believe that the additional monitoring is
4 necessary nor that it would, in fact, produce any
5 meaningful data.

6 MR. ELLISON: There were four figures
7 attached to your prefiled testimony that dealt
8 with this question of where the concentrations
9 might be located. Can you refer briefly to those
10 four figures and explain where the location is
11 again that the concentrations be found?

12 MR. RUBENSTEIN: Yes. If you take a
13 look at page 132 of my testimony, it's the page
14 that's marked figure 1, Morro Bay construction
15 annual average PM10, the outline of the power
16 plant site is shown as a solid black line. And
17 the curves that are shown are isoplats, like
18 isobars on a weather chart, indicating the
19 concentration of PM10 during the peak year of
20 construction.

21 And as you can see, the lines are
22 densest in the notch that's shown in the outline
23 of the power plant. And that notch is the area
24 where the PG&E substation is located.

25 Once you get outside of the substation

1 and certainly once you get into the community the
2 concentrations drop to levels, in this particular
3 case, that are on the order of 2 mcg/cu meter or
4 less.

5 Figure 2 shows a similar set of isoplats
6 for 24-hour average PM10 levels. Figure 3 shows
7 similar effect for the annual average of nitrogen
8 dioxide levels. And figure 4 shows the similar
9 effect for the one-hour average nitrogen dioxide
10 levels.

11 I'd point out that our analysis did not
12 show the construction impacts would cause or
13 contribute to any violations of the state or
14 federal nitrogen dioxide standards. And frankly,
15 I'm at a bit of a loss as to why the condition has
16 been proposed. The impacts during construction of
17 this project are really very similar to those that
18 we have seen and analyzed for other power plant
19 projects all over the state. To the best of my
20 knowledge, the Commission has never required
21 ambient air quality monitoring during project
22 construction for impacts such as these.

23 MR. ELLISON: Thank you. I want to turn
24 now to some rebuttal for some specific testimony
25 that's been filed by CAPE.

1 I want to turn your attention actually
2 to the first issue as set forth in the declaration
3 of Ms. Soderbeck, paragraph 20, relating to the
4 issue of condensible and filterable PM10.

5 Can you briefly address that issue for
6 us, please.

7 MR. RUBENSTEIN: Yes. It's been
8 suggested in that declaration that our estimates
9 of PM10 emissions, particle emissions from the
10 project, have been severely understated because
11 we're only looking at a portion of the particulate
12 matter that comes from the stack. That's simply
13 not true.

14 The issue of looking at filterable and
15 condensible particulates both, which are technical
16 returns, really refer to the measurement method,
17 how you measure particles coming out of the stack.
18 That issue was fully resolved in California over
19 20 years ago.

20 In this District, and in every other
21 district in California, all calculations,
22 analyses, measurements, licensing activities all
23 are based on both filterable and condensible
24 particulates. Frankly, I'm at a loss as to why
25 this issue is still coming up 20 years later.

1 But in any event, just to make it
2 perfectly clear, all of our calculations, all of
3 our analyses reflect both filterable and
4 condensible particulates. There is no issue here.

5 MR. ELLISON: Thank you. I want to turn
6 now to paragraph 30 of Ms. Soderbeck's
7 declaration. And specifically I want to take a
8 look at some language here talking about
9 mitigation measures, or measures proposed. And
10 let me read to you what's listed as A in that
11 paragraph 30.

12 That says: Among the measures which
13 could be applied individually or in combination as
14 needed are a) the elimination of duct firing,
15 which has disproportionately dirtier PM emissions
16 relative to baseload conditions.

17 Do you agree with that statement?

18 MR. RUBENSTEIN: Absolutely not.

19 MR. ELLISON: And will you explain why,
20 please.

21 MR. RUBENSTEIN: I address this issue in
22 my written testimony. At the top of page 125 I
23 present the calculation that shows that the
24 particulate emissions from the gas turbines
25 expressed in units of pounds of pollution for

1 every one million Btus of fuel burned are
2 virtually identical to the particulate emissions
3 associated with duct firing when expressed in the
4 same way, pounds of pollution per million Btus of
5 fuel burned.

6 And that's logical. That makes sense to
7 me. Most particulate matter from combustion
8 turbines and from duct burners is associated with
9 the combustion of natural gas. It's largely
10 sulfates formed from the sulfur that's present in
11 natural gas in trace quantities. Sulfur is part
12 of the components that are used as odorants in
13 natural gas.

14 As a result you would logically expect
15 that particulate emissions are proportional to the
16 amount of fuel that's burned. Consequently, I
17 don't believe that there is any disproportionate
18 PM10 emission rate associated with duct burning.

19 MR. ELLISON: Overall, would the
20 elimination of duct firing change your
21 conclusions?

22 MR. RUBENSTEIN: It would not change the
23 bottomline. The elimination of duct firing would
24 certainly reduce the project's emissions by a
25 small amount.

1 There would be a corresponding reduction
2 in the amount of emission offsets that the project
3 provides.

4 In either case you have a net zero
5 balance. And so whether there's duct firing or
6 not, there is no net increase in emissions,
7 because the emission reduction credits will be
8 sufficient to offset any impacts.

9 With respect to ambient concentrations,
10 if duct firing was eliminated there would be a
11 slight decrease, slight being less than 5 percent,
12 in peak PM10 concentrations under some operating
13 conditions. And no decrease in others.

14 The reason is that the worst case air
15 quality impacts in our modeling analysis are not
16 always associated with duct firing. We looked in
17 the AFC at a number of different operating modes.
18 And some of those include duct firing and some do
19 not. We selected the worst case for each
20 pollutant and for each averaging period.

21 So, for some aspects there would be a
22 slight decrease. For others there would be no
23 change at all in the pollutant concentrations.

24 The bottomline is that the project
25 emissions would be fully offset with or without

1 duct firing. And the project's impacts, in my
2 opinion, would be less than significant with or
3 without duct firing.

4 MR. ELLISON: Would you address the
5 issue of localized PM10 effects, as well?

6 MR. RUBENSTEIN: The localized PM10
7 effects associated with duct firing?

8 MR. ELLISON: Are there such localized
9 effects?

10 MR. RUBENSTEIN: No. As I said, the
11 elimination of duct firing would reduce the
12 localized PM10 concentrations on a 24-hour average
13 basis by less than 5 percent.

14 MR. ELLISON: Thank you. Does that
15 conclude your testimony?

16 MR. RUBENSTEIN: Yes, it does.

17 MR. ELLISON: Thank you. I'd like to
18 now turn to Dr. Walther, previously sworn, but,
19 Dr. Walther, will you again state your name for
20 the record?

21 DR. WALTHER: Eric Walther.

22 MR. ELLISON: What subject matter
23 testimony are you here to sponsor today?

24 DR. WALTHER: Public health with support
25 by the air quality.

1 MR. ELLISON: Were the documents that
2 you sponsored as part of your testimony previously
3 identified in prefiled testimony?

4 DR. WALTHER: Yes.

5 MR. ELLISON: Are those exhibits 4 and
6 exhibit 34?

7 DR. WALTHER: That is correct.

8 MR. ELLISON: Do you have any changes,
9 corrections or clarifications to your testimony?

10 DR. WALTHER: No.

11 MR. ELLISON: And were these documents
12 prepared either by you or at your direction?

13 DR. WALTHER: Yes.

14 MR. ELLISON: And are the facts stated
15 therein true to the best of your knowledge?

16 DR. WALTHER: Yes.

17 MR. ELLISON: Are the opinions stated
18 therein your own?

19 DR. WALTHER: Yes.

20 MR. ELLISON: And do you adopt this as
21 your testimony for this proceeding?

22 DR. WALTHER: Yes.

23 MR. ELLISON: Would you please now
24 summarize your qualifications for the public and
25 the Committee?

1 DR. WALTHER: I obtained my bachelor of
2 engineering physics degree from Cornell
3 University; and then obtained my master of science
4 and PhD in atmospheric science from the State
5 University of New York at Albany.

6 After that I have 32 years of experience
7 in the field, in which the first 15 were in air
8 quality research, followed by 17 years of
9 consulting to industry and government, including
10 assignments with the National Science Foundation,
11 the National Academy of Sciences, the National
12 Academy of Engineering, U.S. Environmental
13 Protection Agency, National Park Service, the U.S.
14 Army, the U.S. Air Force and the United Nations.

15 The research period included three
16 adjunct professorships at the State University of
17 New York at Albany, the University of Arizona at
18 Tucson, and the University of Nevada in Las Vegas.
19 My wife says I say that wrong, you're supposed to
20 say Nevada. Excuse me, that's eastern.

21 I have more than 50 publications related
22 to air quality and associated subjects. And I
23 hold a U.S. patent on a monitoring instrument that
24 is based on the fundamental principle of the
25 conversion of gases to particles, which will be

1 germane to our discussion later on.

2 I also prepared health risk assessments
3 on several power plants under the CEC process, the
4 AFCs. And also prepared a number of health risk
5 assessments under CEQA EIRs; and National
6 Environmental Policy Act EIS's or environmental
7 impact statements, not only for power plants, but
8 also for landfills and other industrial
9 facilities.

10 MR. ELLISON: Thank you. I want to turn
11 now to a summary of your testimony. Would you
12 begin please with a review of the final staff
13 assessment. What were your findings there?

14 DR. WALTHER: The CEC Staff, when they
15 went through their assessment on public health
16 followed a very close identical protocol that I
17 followed, for good reason. We are guided by U.S.
18 federal and state guidelines on exactly how to
19 conduct a health risk assessment on a project.

20 Not to be confused with many other kinds
21 of public health studies, which we'll discuss
22 later on. But specific project health risk
23 assessments have a very clear protocol to be
24 followed, which the staff did, also.

25 They went through the same pollutants,

1 the same noncriteria emissions from the source.
2 They went through the same stages or phases of the
3 project. Demolition of fuel oil tanks, the
4 construction of the project, the demolition of the
5 power generating facilities that are there now,
6 and then the operation of the proposed plant.

7 They also, as I will summarize more in
8 detail, came to the conclusion that both the
9 existing plant and the proposed plant will have
10 insignificant public health impacts which are
11 determined by a calculational methodology that is
12 crystal clear in what we have to do for
13 carcinogenic effects and noncarcinogenic effects,
14 both chronic and acute.

15 At the end of their analysis they
16 concluded that there would be no special
17 conditions of certification needed to protect
18 public health, because the conditions of
19 certification for air quality, which have already
20 been discussed, were sufficient to protect public
21 health.

22 MR. ELLISON: Let's turn now to a short
23 summary of your testimony related to the materials
24 in the AFC and the related filings, please.

25 DR. WALTHER: The AFC went through a

1 detailed health risk assessment in which Gary
2 Rubenstein already talked about some of the
3 computational methodology.

4 But to emphasize the transition and the
5 closeness of air quality and public health, we
6 have to, just as he has to, take the maximum
7 emissions from the project, be they existing
8 equipment under whatever its actual conditions
9 are, or the proposed project under the permitted
10 maximum allowable.

11 We have to look at whatever temperature
12 or other conditions will create those maximum
13 emissions. The maximum one-hour emissions and the
14 maximum annual emissions then are applied to the
15 same air dispersion modeling that he discussed
16 briefly with the USEPA-sanctioned modeled called
17 ISE3.

18 It computes the maximal concentrations
19 that would be obtained at all receptors, of which
20 there are literally hundreds, if not thousands, in
21 the nature of the model that we set up to make
22 sure we cover all possible locations.

23 Then whatever the maximum readings are
24 for noncriteria pollutants, which have the
25 potential of health risk, those then are computed

1 against what's called the unit risk factor for
2 carcinogenic effect. And so you multiply the unit
3 risk factor times the actual concentration of
4 micrograms per cubic meter, and you get a
5 carcinogenic effect.

6 You then look at the concentrations of
7 appropriate noncriteria pollutants that have
8 potential acute or chronic effects, and you
9 divided what he has to get in the very maximum
10 concentrations by what's called a reference
11 exposure level for each contaminant.

12 And the reference exposure level is
13 stated and done by research under the California
14 Office of Environmental Health Hazards Assessment.
15 And together with the Air Resources Board they
16 publish all of the values that we must use in
17 these risk factors.

18 And at the end of the analysis for the
19 proposed plant, in which we look at the turbines,
20 any emergency generator, any fire pumps, all of
21 those are combined to then end up with the final
22 numbers, which are in the AFC.

23 And as anybody can see, on the actual
24 analysis for project specific computation, there
25 are no significant impacts as determined by

1 significance criteria. And the significance
2 criteria are set up under guidelines from the
3 state, and then also implemented through specific
4 rules of the San Luis Obispo County Air Pollution
5 Control District.

6 MR. ELLISON: So your analysis, then, is
7 a project specific analysis, is that correct?

8 DR. WALTHER: Yes, extremely important
9 projects, be they a power plant, a landfill or
10 anything, must undergo this particular kind of
11 protocol in order to determine any potential risk
12 to public health.

13 MR. ELLISON: You heard Mr. Rubenstein
14 talk about some of the assumptions that go into
15 his analysis. I'd like you to talk, if you will,
16 about the concept of the maximum exposed
17 individual and the assumptions that go into your
18 analysis, as well, please.

19 DR. WALTHER: Overestimate is the key
20 word under guidelines from regulatory agencies, be
21 they the district, the state, or the federal
22 government.

23 At every decision point in the
24 computation we are forced to take the maximum
25 values. So Gary had to pick the temperature and

1 conditions of the turbines which would give the
2 maximum emissions.

3 Then the model, itself, looks at 8760
4 specific hours in each year that's analyzed; looks
5 at exactly the meteorology that's occurring on the
6 record, whether it comes to wind speed, wind
7 direction, stability, all of the parameters that
8 go into the physics of moving a pollutant through
9 the atmosphere.

10 The result, and whatever the maximum
11 comes out on, for instance, PM10, it would be the
12 maximum. They, on these noncriteria pollutants,
13 it may be the maximum hour, or the maximum annual
14 depending on whether you're looking at long-term
15 effects, which are like carcinogenic or chronic.
16 You are again forced to take the maximum values
17 which then leads to this concept of the maximum
18 exposed individual. And those are the values that
19 must be reported.

20 In addition to that, we looked at the
21 community for its sensitive receptors. And in the
22 community, for example, there are 12 well
23 identified daycare centers, schools, Morro Bay
24 Elementary, High School. Each of those is
25 computed separately as a receptor so that all the

1 calculations we've been talking about are
2 conducted both at arbitrary points, at all terrain
3 points, and at each one of these sensitive
4 receptors. And, again, they end up insignificant.

5 MR. ELLISON: In terms of the exposure
6 duration, I know there's some pretty interesting
7 assumptions that do tend to overstate. Can you go
8 through some of those exposures, please.

9 DR. WALTHER: Health risk assessment is,
10 on the human side, determined to be a person who
11 could be at any one of these points literally for
12 70 years, 24 hours a day, seven days a week, 365
13 days a year.

14 It's a determination that is no choice
15 to us. We have to follow this protocol. So you
16 take a person's lifetime and you place them at
17 this receptor, regardless of whether he goes to
18 work elsewhere, regardless of whether his real
19 living time on average in many California counties
20 is about eight years, and then people move --
21 regardless of the realities of life, the person is
22 computationally put there under the maximum
23 concentration for a full 70 years --

24 MR. ELLISON: So the assumption is 24
25 hours a day, seven days a week, 365 days a year

1 for 70 years, even though that's humanly
2 impossible?

3 DR. WALTHER: Correct. Or at least it
4 would be boring.

5 (Laughter.)

6 MR. ELLISON: Thanks for keeping us all
7 awake.

8 Let's move now to a brief discussion, if
9 you will, of the results of your project specific
10 health risk assessment, please.

11 DR. WALTHER: The numbers, of course,
12 are in the documents. There were specific
13 requirements by the APCD to look at certain
14 calculations. And then the final results come out
15 to be that on carcinogenic, which has a limit on a
16 source that's forced, and indeed voluntarily
17 designed to have toxics best available control
18 technology, when Gary mentioned oxidation
19 catalyst, for example, it not only reduces carbon
20 monoxide that a lot of people think of first, but
21 it does reduce volatile organic chemicals and
22 compounds. And those typically are carrying much
23 of the potential health risks.

24 So just that technology, itself, is very
25 important in ending up with the actually favorable

1 results. So the maximum exposed individual, with
2 all possible sources considered, is 1.51 in a
3 million. And under the rules both at the state
4 and at the district level, it could be as high at
5 the significance threshold of 10.

6 And then there's similar numbers for the
7 actual results for chronic and acute, which fall
8 below their thresholds. Their thresholds are set
9 at what's called a health hazard index of 1, which
10 is again the concentration divided by the
11 reference exposure level.

12 So whatever under those circumstances we
13 mentioned before, if indeed you then divide by
14 this reference exposure level, you then can
15 determine in the case of the actual project, that
16 the chronic health hazard index will be 0.041
17 compared to 1. And the acute, considering all
18 sources, will be 0.355 compared to 1. Again, in
19 the zone of insignificance.

20 MR. ELLISON: So briefly, for those of
21 us with liberal arts backgrounds, the bottomline
22 is that in carcinogenic risk you're below the
23 threshold of significant, is that correct?

24 DR. WALTHER: That is correct.

25 MR. ELLISON: And with the

1 noncarcinogenic risk, both acute and chronic,
2 you're below the health hazard index of 1, is that
3 correct?

4 DR. WALTHER: That is correct. And I
5 think it's extremely important for everybody,
6 since part of the reason there are a number of
7 people here tonight, compared to last week,
8 there's a real concern over public health. There
9 always should be. And we'll talk about that more
10 later.

11 But on public health, the actual
12 calculation requirements that we go through so
13 overstate the actual health impacts, just as Gary
14 noted earlier, so overstate the concentrations of
15 all pollutants that if the District, which they've
16 said at workshops in the past, were to try to
17 measure these things, they cannot measure even
18 what might be predicted by the modeling, because
19 it overestimates so high.

20 MR. ELLISON: Thank you. I want to turn
21 now to the findings of no significant impacts.
22 That was the finding made by both the Energy
23 Commission Staff and the local Air District. Do
24 you agree with those findings?

25 DR. WALTHER: Correct.

1 MR. ELLISON: And in terms of compliance
2 with laws, ordinances, regulations and standards,
3 do you agree with their findings of compliance
4 there, as well?

5 DR. WALTHER: Yes.

6 MR. ELLISON: I'd like to turn now to
7 some brief rebuttal testimony of prefiled
8 testimony by CAPE.

9 Did you have a chance to review the
10 declaration of John Hartman and the study cited
11 therein related to particulate matter?

12 DR. WALTHER: Yes.

13 MR. ELLISON: And did you have a chance
14 to review the declaration of Sylvia -- I'm going
15 to mess up the name, I know -- Baumgartner --

16 DR. WALTHER: Yes.

17 MR. ELLISON: -- and the studies cited
18 therein?

19 DR. WALTHER: Yes.

20 MR. ELLISON: And did you have an
21 opportunity to review the declarations of Pamela
22 Soderbeck and the studies cited therein, as well?

23 DR. WALTHER: Yes.

24 MR. ELLISON: Can you summarize your
25 conclusions related to those studies for us,

1 please.

2 DR. WALTHER: I can. First of all I
3 want to congratulate Bonita Churney and Pamela
4 Soderbeck for the research that they had to do
5 into a very extensive literature, which literally
6 has thousands of papers, some of the work actually
7 done by my colleagues at the Harvard School of
8 Public Health.

9 The work in general that is reported on
10 in those testimonies from CAPE are by and large
11 epidemiological studies. Epidemiological is
12 simply a multisyllabic word that says we are going
13 to do a statistical analysis of the data that we
14 find of hospital admissions, asthma attacks,
15 emphysema, mortality, other forms of morbidity,
16 which is simply various forms of illness, that
17 might be related to various air pollution measures
18 in a particulate matter concentrations, ozone
19 concentrations, any kind of pollutant
20 concentrations.

21 It's extremely important for the
22 audience and the Commissioners to understand that
23 that whole body of literature and scientific
24 research was designed with the purpose of
25 understanding the general relationships between

1 ambient pollution and health effects. That is not
2 at all the same as a specific analysis of the
3 effect of a project. And extremely important
4 distinction which we will get into in more detail.

5 So whether there are 100 of them, 1000
6 of them, or 10,000 of them, those studies have an
7 objective that allows Paul Allen and many other
8 people, and other folks at the federal and state
9 level, to plan. Because it allows you to start
10 looking at the potential effect on human health of
11 the general levels of pollution that are out there
12 which come from a number of sources.

13 So, let's look at this a little bit more
14 closely. The studies that they report on, and
15 they're, of course, numerous ones, have to look in
16 general at large communities. There are some
17 small communities, but the reason they have to
18 look at large communities, including Los Angeles,
19 is that there are so many variables in the
20 analysis of looking at all the different kinds of
21 effects on health, all the multiple pollutants
22 that are out there, since there's not just one,
23 there are a whole bunch of both criteria and
24 noncriteria pollutants out there.

25 You then have the effects of weather,

1 age, sex. You have race, cultural, where people
2 live. A whole variety of things where the living,
3 of course, starts getting to the ambient
4 concentrations.

5 In order to statistically -- let me
6 emphasize that, these are statistical studies.
7 These are not clinical toxicological studies. In
8 general, it is very difficult to do research under
9 United States law in which you take humans and
10 expose them to various levels of pollution in test
11 chambers. Not that it's impossible, not that
12 there isn't clinical work going on, but the work
13 that is reported, by and large, in the testimony
14 is epidemiological statistical research.

15 So you start with a large database in
16 order to try to control for all these variables.
17 Because if you can't control for the variables,
18 you end up with meaningless data and you don't see
19 a relationship between them. If you don't see a
20 relationship between them, you obviously get
21 nowhere in the original purpose.

22 If you look on the monitoring data side,
23 they work with real monitoring data. Just like
24 there are monitors in San Luis Obispo County,
25 they're in Los Angeles, they're in New York,

1 they're in Portage, there's in all the cities,
2 Stubbenville, that are all these research
3 projects.

4 When they look, for example, at PM10,
5 which, of course, is the emphasis of much of their
6 testimony, even though there are studies on ozone
7 and other pollutants, but when you look at the
8 large body of literature on PM10, it is
9 undifferentiated.

10 This is monitoring data of particulate
11 matter less than 10 microns in aerodynamic
12 diameter, and it includes all source types, it
13 includes all sizes from 10 microns down to
14 basically what are just larger than molecules,
15 down at the angstrom level, or about a thousandth
16 of a micron.

17 It has all chemical composition in it,
18 and that is critical. Let me emphasize that
19 again. It has all chemical composition in it,
20 which is why, as we go on in this discussion, it
21 is unsuitable for the purpose it was put to by the
22 witnesses with that testimony. And then also put
23 into a piece that appeared in the community a day
24 or two or so, and circulated as public health
25 effects that might come from the project.

1 It is completely an invalid application
2 of the information. The data on particulates that
3 is out there can't tell you, without a great deal
4 of research, what might have even been the source
5 of those particles. It is almost like a soup of
6 complexity of chemistry in the particles.

7 But, as long as you're willing to accept
8 it as this mixture, this broad range of chemicals
9 that comes from all sorts of combustion, coal,
10 fuel oil, diesel, gasoline, natural gas, which
11 happens to be the cleanest possible fossil fuel
12 that exists, then you understand that when you get
13 the final relationships that are published in the
14 literature, those relationships are okay on their
15 own.

16 But they're not okay outside the domain
17 in which they've been developed. And they're
18 certainly not okay for the application to a
19 specific project and its potential health effect.

20 MR. ELLISON: Dr. Walther, let me see if
21 I can break this down a little bit into some
22 specific areas of concern and criticism here.

23 Let's talk about the nature of those
24 studies. You talked about different ranges and
25 characteristics of particulate matter. Can you

1 elaborate on that question related to the nature
2 of these studies and the range of characteristics
3 of the particulate matter?

4 DR. WALTHER: The cities that are chosen
5 in order to get an adequate database, although
6 there are a couple of small communities, are
7 overwhelmingly in the various 14 cities, 90 city
8 study, large cities, again that provides you a
9 database.

10 What happens is when you have a database
11 and the relationships built on basically large
12 cities, you end up with a far more toxic
13 particulate matter than you'd have in Morro Bay.

14 In Morro Bay you have automobiles;
15 you've got a power plant; you've got some trucks,
16 you have some diesel being burned. In Los Angeles
17 you have all sorts of refineries, chemical
18 industry, you have cement industry, all sorts of
19 things that exist in the larger cities. And you
20 don't have to go up to the size of Los Angeles.

21 MR. ELLISON: So the issue there is not
22 the population size, it's the number of sources,
23 is that correct?

24 DR. WALTHER: Exactly, it's the kind of
25 sources and the number of sources where they can

1 exist in such complexity in the larger
2 communities.

3 MR. ELLISON: Let me turn to the issue
4 of statistical relationships. You talked about
5 that in terms of mathematical relationships.

6 What kind of variables do these studies
7 cited have to try to control for when they're
8 looking at that kind of mathematical relationship?

9 DR. WALTHER: As I mentioned earlier,
10 they need to try to control for the fact that
11 there's always multiple pollutants out there. It
12 is not just PM10 in the atmosphere.

13 So, once they control for various
14 pollutants, they have to try to control for the
15 weather, the people who are getting asthma,
16 emphysema, lung cancer, even mortality, all of
17 those variables on human health have to be
18 controlled by genetic predisposition, culture,
19 race and some of the measures I mentioned earlier.

20 MR. ELLISON: Let's talk about, you used
21 the term domain before. And you've said that
22 those studies are applicable within that domain.
23 Can you elaborate on the concept of domain for the
24 rest of us, please.

25 DR. WALTHER: The domain here is that

1 when you are working with this complex set of
2 particulate, and you're working with a series of
3 cities that have all the sources that enter into
4 that particulate, you can then not take that
5 domain and say the relationship that exists there
6 can now be applied to a specific source, a power
7 plant, a landfill, a chrome shop.

8 Any of those specific sources like a
9 power plant, have a very specific PM10 of a very
10 narrow nature.

11 MR. ELLISON: So, a project that's in a
12 different domain would not -- you wouldn't have
13 the same mathematical relationship, is that
14 correct?

15 DR. WALTHER: You wouldn't apply that
16 methodology that's used in the epidemiological
17 studies.

18 MR. ELLISON: Let's talk a little bit
19 about CAPE's testimony and the use of maximum
20 concentrations. Can you provide a brief summary
21 there, as well?

22 DR. WALTHER: Even if the relationships
23 were applicable, let me emphasize they're not, but
24 even if they were, you'd have to ask yourself,
25 okay, now that the health studies have determined

1 there'll be 1 percent increase in this health
2 effect based on an increase of 10 mcg/cu meter of
3 the complex PM soup; another study will say, then
4 there's this other effect that might increase to
5 present, based again on a 10 mcg/cu meter
6 increase.

7 Now you have to come back to reality.
8 The project, not the background concentration, the
9 project and its impact on the residents of Morro
10 Bay, even with all the over-estimates that Gary
11 and I have described, if you look to the center of
12 the community, not the top of Morro Rock, which is
13 irrelevant, obviously, not the top of Black Hill,
14 not everybody lives on top of Black Hill, but
15 specifically run it right down through the middle
16 of the community for some reasonable measure, such
17 as the annual PM10 concentration that exists in
18 that part of the community, you'll find that the
19 project, even with all the over-estimates, will
20 produce approximately .05 to .1 mcg/cu meter on an
21 annual average.

22 People don't have health effects
23 happening on one day. A very sensitive asthmatic
24 can be hit by a specific episode on one day, but
25 you don't develop the overall health effects and

1 end up with a final health problem, we'll call it,
2 from just one day. You end up with repeated
3 exposures, and then when you look at the
4 concentrations that truly might exist from the
5 project in Morro Bay, you end up now at
6 concentrations so low that even if you did
7 multiply it by the relationships found in these
8 studies, you'd end up with .02 percent increase,
9 et cetera.

10 You end up below a level of confidence,
11 below a level of significance where, indeed, you
12 can no longer make a meaningful statement that
13 that particular level of concentration from the
14 project could actually cause the health effect
15 that's asserted.

16 MR. ELLISON: So one of the basic
17 methodological flaws then is the application of
18 taking a maximum concentration that physically
19 only occurs in one place, and assuming that that
20 maximum concentration, instead of occurring in one
21 place, occurs throughout the community. Is that a
22 fair summary?

23 DR. WALTHER: Correct. It is the
24 equivalent of taking the 10,000 people in Morro
25 Bay and putting them at that receptor.

1 MR. ELLISON: Thank you. I want to go
2 back just briefly on one comment you kind of made
3 in passing. I want to make sure it was not
4 misunderstood.

5 Do you recall discussing, at some of the
6 workshops discussions about whether the emissions
7 could be measured when the plant is operating? Do
8 you remember --

9 DR. WALTHER: Correct.

10 MR. ELLISON: -- your statement for
11 that?

12 DR. WALTHER: Correct.

13 MR. ELLISON: And you said that it
14 basically could not be measured.

15 DR. WALTHER: Correct.

16 MR. ELLISON: Did you mean that
17 statement to represent that it could not be
18 measured because those effects would be so low as
19 to not be measurable?

20 DR. WALTHER: Exactly. Whether you look
21 at emission inventory or you look at the actual
22 concentrations that come even from the over
23 estimates of modeling, you'll find that San Luis
24 Obispo County electric power generation is
25 approximately 5.6 thousandths of the entire PM10

1 inventory.

2 If you look at Los Angeles, which is in
3 most of those studies, Morro Bay is not in most of
4 the epidemiological studies, it's not in any of
5 them, but in Los Angeles the particulate matter
6 from power plants is 2 one-thousandths of the
7 total inventory of particulate matter.

8 So, not only was it the complexity I
9 referred to, but on just a magnitude of emissions,
10 so it should be no surprise that then even when
11 Gary and I are forced to these assumptions of
12 over-estimates, and end up with a concentration of
13 say .05 to .1, on an annual basis, there's no way
14 to measure it.

15 You can't see it. The techniques of
16 measurement are not able to resolve such a small
17 increase, which is why the District made
18 accurately the statements, and it would be made by
19 people like them all over the country who do the
20 same thing, if you watch the monitoring data you
21 will not see the effect of this project in the
22 data.

23 MR. ELLISON: Thank you. So, I guess in
24 summary then the CAPE studies are not site
25 specific, is that correct?

1 DR. WALTHER: That is correct.

2 MR. ELLISON: And that requires a
3 statistical leap from those studies which you
4 believe are inapplicable to this project?

5 DR. WALTHER: Correct. In fact, it
6 requires a methodology that they did not use if
7 one is after the effect of a project.

8 MR. ELLISON: Thank you. I think at
9 this point we can go ahead and move our exhibits
10 into evidence.

11 HEARING OFFICER FAY: Is there any
12 objection? These are the exhibits cited by you
13 and the witnesses as supporting their testimony;
14 and they are listed in written testimony.

15 MR. ELLISON: Correct.

16 HEARING OFFICER FAY: All right, I hear
17 no objection so those will be entered in the
18 record.

19 MR. ELLISON: I'm sorry, one other I did
20 not list in that previous list the portions of
21 exhibit 134 that are the public health and the air
22 quality testimony, so I'd also move those portions
23 of exhibit 134, as well.

24 HEARING OFFICER FAY: Okay.

25 MS. CHURNEY: And I just have a point of

1 clarification on exhibit 4. The portions
2 referenced from the visual resources, I couldn't
3 find any air quality references or data in there.

4 HEARING OFFICER FAY: Exhibit 4?

5 MS. CHURNEY: It's --

6 HEARING OFFICER FAY: You couldn't find
7 air quality in the AFC?

8 MS. CHURNEY: No, it's the second bullet
9 that's the specific reference to visual resources.

10 MR. ELLISON: I believe that's the
11 visible plume discussion, and that's why it would
12 be in the AFC.

13 HEARING OFFICER FAY: Okay. Can you
14 help her with her location and problem? Can you
15 cite where that would be?

16 MS. CHURNEY: If that was the intent we
17 can look for it.

18 HEARING OFFICER FAY: Okay.

19 MS. CHURNEY: We couldn't find it.

20 HEARING OFFICER FAY: It would be under
21 visual resources, is that the assumption?

22 MR. ELLISON: Yes.

23 HEARING OFFICER FAY: Okay, thank you.
24 Does that answer your question?

25 MS. CHURNEY: Yes, thank you.

1 HEARING OFFICER FAY: Any other
2 comments? All right, those exhibits are admitted.

3 MR. ELLISON: Thank you. I'd make the
4 witnesses available now for cross-examination.

5 HEARING OFFICER FAY: Okay, thank you,
6 Mr. Harris. Before we do that I'd just like to
7 mention a couple of housekeeping things. I
8 neglected to ask, as I promised Ms. Collins, that
9 the parties are welcome to comment in their briefs
10 on the written proposal from the Chumash Tribe
11 that was read today and rendered, and was passed
12 out to the parties. They have a recommendation.

13 In addition, I want to call your
14 attention to a mistake on our agenda attachment A,
15 topic and witness schedule. It lists under air
16 quality and public health, the third bullet, APCD,
17 Gary Willie, who is with the APCD. But Mr.
18 Hartman and Ms. Soderbeck are not. They are with
19 CAPE. And that is a typographical error.

20 All right, so we have the panel
21 available for cross-examination. Ms. Holmes?

22 MS. HOLMES: No questions.

23 HEARING OFFICER FAY: The City?

24 MR. SCHULTZ: I'm going to try to ask
25 this in one question, and then if I have to I'm

1 going to break it down.

2 //

3 CROSS-EXAMINATION

4 BY MR. SCHULTZ:

5 Q Throughout the previous testimony the
6 City's been concerned about a review and comment
7 on different plans. In the air quality sections
8 there's many plans that are required to be
9 submitted. There's a dust mitigation plan; a
10 construction mitigation plan; a diesel
11 construction mitigation plan; mitigation
12 contingency plan; an offsite mitigation plan; an
13 ambient air monitoring plan; an LRP control and
14 monitoring plan; startup and commission plans. So
15 there's quite a few plans that are mentioned that
16 have to be submitted to either the CPM or to the
17 CEC or to the District for review and approval.

18 And my question to you is do you have
19 any issue with the fact if any of those plans were
20 also submitted to the City for a review and
21 comment?

22 MR. RUBENSTEIN: Just for the record,
23 Mr. Schultz, I think some of the plans that you
24 mentioned are not actually related to air quality
25 or public health, but the answer to your question

1 is that we would have no objection to providing
2 the City with copies of those plans for their
3 review.

4 MR. SCHULTZ: And comment?

5 MR. RUBENSTEIN: As long as the comments
6 are provided within the timetables that are set
7 forth in the verification periods, that's correct.

8 MR. SCHULTZ: Thank you, no further
9 questions.

10 HEARING OFFICER FAY: All right, let's
11 go ahead and, CAPE, do you have cross-examination?

12 MS. CHURNEY: Yes, we do. And just
13 procedurally I wanted to let you know that Ms.
14 Soderbeck will be assisting me with the cross-
15 examination. We won't be duplicative, and
16 hopefully we'll get through it more quickly this
17 way.

18 HEARING OFFICER FAY: That's fine.

19 CROSS-EXAMINATION

20 BY MS. CHURNEY:

21 Q My first questions are for Mr.
22 Rubenstein. Your highest educational degree is a
23 BS in engineering, is that correct?

24 MR. RUBENSTEIN: That's correct.

25 MS. CHURNEY: You don't have any degree

1 in meteorology, for example?

2 MR. RUBENSTEIN: That's correct.

3 MS. CHURNEY: And no degree in public
4 health?

5 MR. RUBENSTEIN: That's correct.

6 MS. CHURNEY: And you're not a
7 professional engineer, are you?

8 MR. RUBENSTEIN: I'm a qualified
9 environmental professional certified by the
10 Institute for Professional Environmental Practice.
11 There is no registration for air quality
12 engineers, and I'm not a registered engineer.

13 MS. CHURNEY: And I notice from the QEP
14 roster that you're listed as an EIT. Could you
15 explain to me what that is?

16 MR. RUBENSTEIN: Yes. Engineer in
17 Training is a preliminary step towards becoming a
18 registered engineer, which I never took to
19 completion because, as I said, there is no
20 registration program for air pollution engineers.

21 MS. CHURNEY: So you're a trainee in
22 engineering, is that correct?

23 MR. RUBENSTEIN: No, that's not.

24 MS. CHURNEY: Well, you just stated that
25 you're an Engineer in Training, is that correct?

1 MR. RUBENSTEIN: No, I hold an Engineer
2 in Training certificate from 1973.

3 MS. CHURNEY: And how many times have
4 you attempted to take and pass but have failed the
5 professional engineering exam?

6 MR. ELLISON: I'm going to object to
7 these questions. We've already established that
8 this is not a relevant professional qualification
9 in the State of California.

10 PRESIDING MEMBER MOORE: Sustained.
11 You've established what the credentials of the
12 witness are. If you've got questions about the
13 testimony and the documents, then let's go there.

14 HEARING OFFICER FAY: I think it's a
15 matter long in the record that the Commission has
16 accepted Mr. Rubenstein as an expert in this
17 field. And I think we'll just go with that.

18 MS. CHURNEY: Well, I would take
19 exception that those go to his qualifications.
20 But moving on, you've been involved in 25 plant
21 siting cases, is that correct?

22 MR. RUBENSTEIN: At least. Those are
23 all that I listed, yes.

24 MS. CHURNEY: And have you ever found,
25 with respect to any plant siting case, a

1 significant impact on the environment?

2 MR. RUBENSTEIN: No, because I've never
3 let my clients get to that point.

4 MS. CHURNEY: And of that total of 25,
5 how many were on behalf of project applicants?

6 MR. RUBENSTEIN: Twenty-one.

7 MS. CHURNEY: And have you ever
8 represented a residents' group or intervenors with
9 respect to power plant siting cases?

10 MR. RUBENSTEIN: No, I have not.

11 MS. CHURNEY: And since you left CARB
12 have you worked solely as an advocate for the
13 polluting entity?

14 MR. ELLISON: I'm going to object to the
15 question as argumentative.

16 MR. RUBENSTEIN: I'd like to answer it.

17 MR. ELLISON: Well, don't.

18 (Parties speaking simultaneously.)

19 PRESIDING MEMBER MOORE: Yeah, if you
20 rephrase it, drop the word polluting out. Let's
21 make it clear that a pejorative line of
22 questioning is not going to get you very far. It
23 is going to incur the ire of the Chair, and
24 probably color the way this is all viewed.

25 So, let's be careful. Am I clear?

1 MS. CHURNEY: Yes, sir.

2 PRESIDING MEMBER MOORE: Thank you.

3 MS. CHURNEY: Since you left CARB have
4 you worked solely as an advocate for industry?

5 MR. RUBENSTEIN: No.

6 MS. CHURNEY: What other entities have
7 you worked for?

8 MR. RUBENSTEIN: I've served often as an
9 expert for the California Attorney General's
10 Office on proposition 65, and related cases,
11 regarding toxic air pollutants.

12 I've also provided expert services to
13 the Alaska Department of Law, to the California
14 Air Resources Board, to the U.S. Environmental
15 Protection Agency, and to a variety of local Air
16 Pollution Control Districts in California.

17 MS. CHURNEY: And you're not an expert
18 on public health impacts of PM concentrations, are
19 you?

20 MR. RUBENSTEIN: That's correct.

21 MS. CHURNEY: You're being paid by Duke
22 for your participation here this evening, right?

23 MR. RUBENSTEIN: Yes, I am.

24 MS. CHURNEY: And how much are you being
25 paid?

1 MR. ELLISON: I'm going to object to the
2 question as irrelevant.

3 HEARING OFFICER FAY: Sustained.

4 MS. CHURNEY: It's fair to say, Mr.
5 Rubenstein, that you're paid substantially more at
6 Sierra Research than you were CARB, is that
7 correct?

8 MR. ELLISON: I assert the same
9 objection, as irrelevant.

10 HEARING OFFICER FAY: Counsel, this is
11 burning up time and it's not the kind of cross
12 that we usually entertain as productive.

13 MS. CHURNEY: Well, I think it does go
14 to his bias, but I'll move on.

15 PRESIDING MEMBER MOORE: Goes to whose
16 bias? Let me see if I can make this clear. Let's
17 just take a little break here.

18 We're here to conduct evidentiary
19 hearings. I'm sure that especially counsel coming
20 out of law school, and I didn't come out of law
21 school, but I certainly fraternized with a number
22 of people that did, understand the relevance of
23 the word evidence.

24 We're here to collect evidence. We're
25 here to try and collect facts. That's what I deal

1 with. That's what I'm going to have to write my
2 decision based on.

3 I depend on counsel for all, for the
4 intervenors, for staff, for the applicant to try
5 and lay out the best case that they can, but also
6 to lay out evidence in as dispassionate a manner
7 as possible.

8 When the public testimony period comes
9 we entertain a wide variety of comments, many of
10 them very emotional in nature. I do not expect,
11 will not tolerate that kind of emotional leaning
12 or bias on the part of any of the representatives.

13 I depend on you to conduct yourself
14 professionally, and to put questions out
15 professionally. And when you take that hat off
16 and you want to come back at the end and testify
17 in the public service or the public arena, and you
18 want to have an emotional bias that colors what
19 you've been hearing or what you want to say, then
20 that's fine. That's appropriate.

21 But until then I expect everyone to
22 conduct themselves professionally. And you'll end
23 up using your time, and frankly not making your
24 case very well. And that goes to everyone who
25 participates in this.

1 So, let's try and keep it on that plane,
2 and make sure that the evidence that's coming in
3 is in such a form that any one of us can use.

4 Counsel, you have the floor.

5 MS. CHURNEY: You're not an expert on
6 biological impacts on flora or fauna that may
7 result from air pollution, are you?

8 MR. ELLISON: I'm going to object to the
9 question as irrelevant to the subjects of public
10 health and air quality.

11 MS. CHURNEY: Well, I'd like to --
12 you're including in your exhibits, in that exhibit
13 4 that I referred to earlier, an exhibit on marine
14 biological resources related to air quality.

15 And to the extent that you're pointing
16 to that in Mr. Rubenstein's testimony and seeking
17 to introduce that by means of his testimony, I
18 think I'm entitled to know.

19 MR. ELLISON: Counsel, can you cite the
20 specific document to which you're referring, and
21 we will give a copy to Mr. Rubenstein to review.

22 MS. CHURNEY: It's the AFC, exhibit 4,
23 and I think it's the fourth bullet referring to
24 section 6.6A, marine biological resources.

25 MR. RUBENSTEIN: Those materials are

1 related to nitrogen deposition analyses which I do
2 believe to be within my area of expertise.

3 MS. CHURNEY: Let me just verify, too,
4 your testimony from your written testimony that PM
5 emissions from the new plant are PM2.5 or smaller,
6 is that correct?

7 MR. ELLISON: Could you cite the
8 specific portion of the testimony you're
9 referring, please?

10 MS. CHURNEY: It's out of the data
11 request responses, but I believe --

12 MR. ELLISON: Which exhibit, and what
13 line?

14 MS. CHURNEY: So Mr. Rubenstein doesn't
15 know offhand whether the emissions --

16 MR. ELLISON: The witness is allowed to
17 review the documents, and please give him that
18 time. If you give him the opportunity to review
19 the document, we'll be glad to answer your
20 question.

21 MS. CHURNEY: Were the models run other
22 than SCREEN3 and the ISC model by you?

23 MR. RUBENSTEIN: I'm sorry, is that
24 related to the previous question or have we moved
25 on to a new one?

1 MS. CHURNEY: We've moved on, but let
2 me -- we have found the cite, so let me give it to
3 you.

4 MR. RUBENSTEIN: Okay.

5 MS. CHURNEY: It's your exhibit 34, and
6 it's response 13.

7 MR. RUBENSTEIN: I'm sorry, I have it in
8 front of me now and I have reviewed it, could you
9 restate the question?

10 MS. CHURNEY: Let me just verify then
11 that all the PM emissions from the new plant will
12 be PM2.5 or smaller?

13 MR. RUBENSTEIN: Actually that's not
14 what the response says. What the response says is
15 all of the combustion particulate emissions will
16 be 2.5 microns or smaller. And the combustion
17 particulates are only a subset of the total
18 particulates that are associated with operation of
19 the units.

20 MS. CHURNEY: Are there any other
21 particulate matter, other than combustion
22 particulate, that will be coming out of the plant?

23 MR. RUBENSTEIN: Yeah, there will be
24 some amount of particulate matter, for example,
25 that's associated with particulates in the inlet

1 air that will come out through the stack, that
2 will pass right through.

3 MS. CHURNEY: And what percentage of the
4 total is that?

5 MR. RUBENSTEIN: That would represent
6 approximately 5 percent of the total allowable
7 emissions; and in my judgment it could represent
8 as much as 20 percent of the actual particulate
9 emissions that come out of the stack.

10 MS. CHURNEY: Are those emissions
11 emissions that have to be offset?

12 MR. RUBENSTEIN: Yes.

13 MS. CHURNEY: And what percentage would
14 you estimate are ultra-fine or less than .1
15 microns in diameter that will be coming from the
16 plant?

17 MR. RUBENSTEIN: I don't have any data
18 to venture a guess on that.

19 MS. CHURNEY: If I may ask what is the
20 largest chemical component of these PM emissions
21 that will come from the plant?

22 MR. RUBENSTEIN: Based on the data that
23 I've seen it's principally going to be sulfates.

24 MS. CHURNEY: Will carbon be included
25 among the PM emissions from the new plant?

1 MR. RUBENSTEIN: Yes.

2 MS. CHURNEY: And what percentage of the
3 emissions will carbon be?

4 MR. RUBENSTEIN: I don't have any good
5 data at this point. It will be something less
6 than 50 percent.

7 MS. CHURNEY: Going back to my previous
8 question regarding the modeling, were models run
9 other than SCREEN3 and ISC?

10 MR. RUBENSTEIN: Yes, there were two
11 other models that were used. One is a model
12 called ISC-OLM, which is a variation of ISC that
13 includes an ozone-limiting algorithm.

14 And the second is a model called HRA,
15 which stands for health risk assessment. That's a
16 model that was developed by California Air
17 Pollution Control Officers Association, and was
18 used in the health risk assessment.

19 MS. CHURNEY: And what were the results
20 of those modelings?

21 MR. RUBENSTEIN: The ISC-OLM modeling
22 was used to present the results of the nitrogen
23 dioxide modeling analyses which are presented in
24 various portions in the AFC and in data responses.

25 The basic conclusion from all of those

1 analyses was that the project will not cause or
2 contribute to any violations of the state or
3 federal air quality standards for nitrogen
4 dioxide.

5 The HRA model was used for various
6 analyses in support of the health risk assessment
7 that both Dr. Walther and I testified regarding
8 earlier. The conclusion for those analyses was
9 that the project will not result in any
10 significant health impacts that exceed the ten in
11 one-million significance levels.

12 MS. CHURNEY: The ISC model looks solely
13 at the highest one-hour emissions from the plant,
14 is that correct?

15 MR. RUBENSTEIN: No.

16 MS. CHURNEY: What else does it
17 consider?

18 MR. RUBENSTEIN: The ISC model evaluates
19 the impacts for every hour of meteorological data
20 that is put into the model. And in this
21 particular case we took a look at three years of
22 weather data so there were over 25,000 hours of
23 data that were -- 25,000 hours of calculations
24 that were performed.

25 Those calculations were performed at a

1 large number of receptors, individual points on a
2 map, if you will. And the calculations were
3 performed for a number of different pollutants and
4 averaging periods and sources. I don't know
5 exactly how many numbers that ISC generates, but
6 it's certainly in the tens of thousands.

7 MS. CHURNEY: In the worst case analysis
8 it looks solely at one-hour emissions, right? The
9 highest one-hour emissions?

10 MR. RUBENSTEIN: No. The ISC model
11 generates all of the numbers that I just
12 mentioned. As a matter of regulatory requirement
13 we're required to look at the worst case in
14 preparing our air quality impact analysis, but the
15 ISC model, itself, looks at all of the data.

16 MS. CHURNEY: Does that include
17 parameters from entry and accumulation and
18 recirculation of the emissions?

19 MR. RUBENSTEIN: Could you be more
20 specific about what you mean?

21 MS. SODERBECK: Let me take a whack at
22 this one, Gary. What I'm referring to is the fact
23 that when PM becomes apparent at the ground level
24 it doesn't instantly disappear. It accumulates
25 over time and it can be recirculated --

1 MR. ELLISON: Is there a -- excuse me,
2 is there a question coming? And that's two
3 objections. Number one, I want to hear a
4 question. Number two, --

5 MS. SODERBECK: You asked for
6 clarification and --

7 MR. ELLISON: -- I -- I --

8 MS. SODERBECK: -- I just gave you what
9 we meant by those terms.

10 HEARING OFFICER FAY: Excuse me, just a
11 moment. I thought you were taking over the
12 questioning. If this is preliminary to a
13 question, that's fine.

14 MR. ELLISON: Okay, I'd state a second
15 objection, if I could, Mr. Fay.

16 The questions that are coming, our
17 witness is very knowledgeable and able to answer
18 those questions. I'm not certain that all of
19 these are related to his direct testimony.

20 And so I would ask again that the
21 questions be prefaced with references to the
22 direct testimony, because we're going to be, I
23 think, vigilant about making sure that the
24 questions come in related to that direct
25 testimony. We don't want to do discovery here

1 today. So I just wanted to get that out.

2 MS. SODERBECK: Let me ask a question of
3 Mr. Fay, please?

4 HEARING OFFICER FAY: Sure.

5 MS. SODERBECK: The AFC testimony -- I'm
6 sorry, the testimony they'd submitted is a very
7 brief summary that includes massive exhibits which
8 have a lot of information.

9 Is there any way other than our cross-
10 examination we can ask the witness about that
11 information?

12 HEARING OFFICER FAY: If it is in those
13 exhibits then they're responsible for it, and they
14 have to answer the questions.

15 MS. SODERBECK: Okay.

16 HEARING OFFICER FAY: So, in essence
17 while Mr. Harris would like to limit this, I
18 disagree. And you may not explore the entire
19 subject of everything that occurs to you about air
20 quality, but if it is in those exhibits you can
21 ask him every single question about them. That is
22 part of his testimony. And they are responsible
23 for it.

24 PRESIDING MEMBER MOORE: Right, but to
25 be fair, you need to include -- I mean what he's

1 asking for is a reference point if he's going to
2 ask the witness to respond. To be fair, if you go
3 into an appendix and you want to pull out a
4 reference, cite it, page and paragraph, and then
5 at least we're all, no pun intended, all on the
6 same page. And we can get a good reference point.

7 So, that's, I think, a good operating
8 rule, and that part of Mr. Harris' objection is
9 accepted. And I think we'll all follow it from
10 now on.

11 MS. CHURNEY: Do you need a further
12 explanation of accumulations and recirculation?

13 MR. RUBENSTEIN: Yes, Ms. Churney, I do,
14 and it's only because in various proceedings I've
15 heard those terms applied to meteorology and to a
16 whole host of other things. And it would be
17 helpful if you could continue where you were in
18 terms of explaining the context of the question.

19 MS. SODERBECK: Okay, what we were
20 wondering is whether the modeling assumed that the
21 PM emissions from the plant accumulated or were
22 recirculated by changing winds or anything else?
23 Or whether you were simply looking at the
24 emissions coming out of the stacks and hitting the
25 ground, and presuming that they go nowhere else.

1 MR. RUBENSTEIN: This model, as all
2 dispersion models, take a look at the
3 concentrations that result from a plume that
4 remains fairly coherent, blowing in a single
5 direction for one hour consistently.

6 It does not evaluate anything that is a
7 multi-hour type of an effect. This one-hour
8 effect is most conservative because it's extremely
9 rare, however, that the wind does blow in a single
10 direction for one hour. And any turbulence that
11 you have or any movement of the plume during the
12 course of that hour would result in much much
13 lower actual concentrations. So it's conservative
14 for that reason.

15 MS. CHURNEY: What modeling was done to
16 take the combined plant emissions and ambient
17 concentrations into account?

18 MR. RUBENSTEIN: The combination of the
19 plant's emissions impacts and ambient
20 concentrations were analyzed through a modeling
21 analysis of the plant's impacts, combined with the
22 assumption that those worst case concentrations
23 would be occurring at the same time and at the
24 same place as the highest concentrations measured
25 at the various monitoring stations that are

1 referenced in the AFC.

2 So, again, it's another element of
3 conservatism because even if the worst case
4 concentration of the existing monitors occurred in
5 the winter, and the worst case concentration
6 predicted for the power plant occurred in the
7 summer, we assumed that they occurred at exactly
8 the same time and exactly the same place; added
9 the two numbers together. And that's how we took
10 into account the combined impacts of the plant and
11 the existing air quality.

12 MS. CHURNEY: On AFC table 6.2-44,
13 that's on page 6.2-65, you indicate that the
14 maximum model concentrations for 24 hour PM from
15 the new plant will occur at Morro Rock in the
16 amount of 24.2 mcg/cu meter.

17 And that the highest concentration
18 excluding Morro Rock is 8.7 mcg/cu meter, is that
19 correct?

20 MR. RUBENSTEIN: Can we roll back the
21 tape a little bit? We're talking about which
22 table?

23 MS. CHURNEY: It's on page 6.2-65, and
24 it's table 6.2-44.

25 MR. RUBENSTEIN: Okay, I'm sorry, I'm

1 finally up with you. Can you go back again and
2 indicate which numbers you were referring to?

3 MS. CHURNEY: The 24.2 mcg/cu meter, and
4 that's the 24 hour PM. And the highest
5 concentration excluding Morro Rock is 8.7 mcg/cu
6 meter. Do you see that?

7 MR. RUBENSTEIN: No. Actually this
8 particular table, 6.2-44 reports -- this is going
9 to sound like jargon -- the highest second-high
10 24-hour average PM10 concentration, because that's
11 required in some regulatory analyses.

12 And this particular table is focused on
13 the federal PSD thresholds. And so you don't see
14 the 24.2 mcg/cu meter number there. What you see
15 is 20.2, which is the highest second-high
16 concentration.

17 MS. CHURNEY: Do you know what the
18 highest high is?

19 MR. RUBENSTEIN: Yes, it is 24.2, and
20 that's on table 6.2-38.

21 MS. CHURNEY: The 8.7 mcg/cu meter,
22 where is that location?

23 MR. RUBENSTEIN: I believe that that
24 location is on -- I have to do a little bit of
25 checking to be certain, but I believe it's on

1 Black Hill.

2 MS. CHURNEY: And what's the equivalent
3 from a high as opposed to the second-highest high?

4 MR. RUBENSTEIN: I'm not sure that
5 number is in the record anywhere, but I have notes
6 that suggest that that number's approximately 10
7 mcg/cu meter.

8 MS. CHURNEY: And if you were to put the
9 best quality monitor that you know of right at
10 that location where the second-highest high is
11 located, you indicated you believed it was Black
12 Hill, during the modeled worst case meteorological
13 conditions, would you be able to measure the
14 emissions from either the existing or the new
15 plant?

16 MR. RUBENSTEIN: No, I don't believe so.

17 MS. CHURNEY: Could you do so if there
18 were hypothetically no ambient concentrations of
19 PM from any other source?

20 MR. RUBENSTEIN: If there were no ocean,
21 and so there were no sea salt, there were no cars,
22 no homes, and if the power plant's emissions were
23 really as high as the worst case levels, and if
24 you happened to have the year in which the weather
25 conditions for 24 hours matched what we modeled,

1 then, yes, a sensitive model would be -- a
2 sensitive monitor would be able to detect those
3 concentrations, if all those assumptions were
4 true.

5 MS. CHURNEY: I understand that with
6 ambient concentrations, as well, such a monitor
7 could not differentiate what came from the plant
8 or what was already there, is that correct?

9 MR. RUBENSTEIN: Each particular type of
10 source has a unique fingerprint, so that for
11 example with enough analysis you could distinguish
12 sea salt from combustion particulates. But there
13 are very limited techniques available to
14 distinguish combustion particulates from different
15 types of sources.

16 And since the predominant two components
17 from these units will be sulfates and carbon, it
18 would be impossible to distinguish those from
19 other sources that emit sulfates and carbon, which
20 is virtually anything that burns a fuel.

21 MS. CHURNEY: Do you believe that better
22 monitoring results will occur from continuous PM
23 monitors as compared to the current every six day
24 monitoring that occurs in Morro Bay?

25 MR. RUBENSTEIN: I assume you're asking

1 that question as a matter of general practice, as
2 opposed to anything specifically related to the --

3 MS. CHURNEY: Right, based on your
4 expertise.

5 MR. RUBENSTEIN: There have been
6 significant advances in continuous particulate
7 monitors over the last three to five years. And
8 the information that I've seen suggests that the
9 quality is improving substantially.

10 I believe that most agencies are
11 starting to gradually move towards continuous
12 monitors, and I think that that is a movement in
13 the right direction.

14 Whether the state of the art today is
15 comparable to the state of the art for the old
16 style monitors, I'm not certain.

17 MS. CHURNEY: What is the highest
18 modeled concentration of PM from the existing
19 plant, excluding the Rock?

20 (Pause.)

21 MR. RUBENSTEIN: I believe that number
22 is 3 mcg/cu meter.

23 MS. CHURNEY: And are you familiar with
24 the rough estimate calculated by Ms. Soderbeck for
25 that figure using the data that she had available

1 from the AFC and the data request responses and
2 her declaration and attached reports?

3 MR. RUBENSTEIN: Could you refer me to a
4 specific location in her declaration?

5 MS. SODERBECK: Gary, I think the
6 easiest place to find that is in the attached
7 reports. For example, if you look at the report
8 on the impacts on children, that would be
9 described in the footnotes 13 and 14 on page 9,
10 where I was trying to come up with a ratio
11 calculation.

12 PRESIDING MEMBER MOORE: Counsel, let me
13 ask a question because I'm not sure I understood
14 your question completely.

15 Were you asking whether Mr. Rubenstein
16 you generated his own data, or used his own data
17 to generate that number? Or whether he relied on
18 Ms. Soderbeck's data?

19 MS. CHURNEY: At this point I'm just
20 asking whether he was familiar with that
21 calculation done by Ms. Soderbeck. I haven't
22 posed a question.

23 PRESIDING MEMBER MOORE: All right, then
24 I misunderstood your question.

25 MR. RUBENSTEIN: I'm afraid I reviewed

1 that quite some time ago, so I'd have to refresh
2 my memory. If you want to give me a few minutes,
3 I will do that.

4 MS. CHURNEY: Okay, we can come back to
5 that if you'd like that.

6 MR. RUBENSTEIN: Fine.

7 MS. CHURNEY: You can take a look at it
8 over the break and then we'll come back to that.

9 Let's turn to meteorological data that
10 was used in the model, which I understand was
11 taken from previous PG&E data, the existing plant,
12 in combination with mixing taken from Vandenberg
13 Air Force Base, is that correct?

14 MR. RUBENSTEIN: That's correct.

15 MS. CHURNEY: How far is Morro Bay from
16 Vandenberg, do you know?

17 MR. RUBENSTEIN: No, not off the top of
18 my head.

19 MS. CHURNEY: Did you know how far
20 inland the Vandenberg location was?

21 (Pause.)

22 MS. SODERBECK: Just to move this along,
23 Gary, do the numbers 45 miles away from Morro Bay
24 and three miles inland ring a bell with you?

25 MR. RUBENSTEIN: It doesn't ring a bell,

1 but that does sound reasonable to me.

2 MS. CHURNEY: I know you're not a
3 meteorologist, but on what basis can you conclude
4 that mixing high data taken from that remote
5 location would be the same as in Morro Bay?

6 MR. RUBENSTEIN: Based on modeling
7 analyses that I've reviewed throughout the State
8 of California and in other states, it is typical
9 to use mixing high data from locations that are
10 quite distant from individual sites, because there
11 aren't that many locations where quality mixing
12 high data are collected.

13 In general the soundings are applicable
14 over wide ranges. There's a station in Oakland,
15 for example, that is used for modeling analyses
16 through much of central northern California. And
17 the Vandenberg air quality data are used for a
18 wide range of sources in this part of the state,
19 as well.

20 MS. CHURNEY: At Metcalf, however, the
21 data was taken from a site quite close to the
22 proposed new plant, was it not?

23 MR. RUBENSTEIN: No. The mixing high
24 data, the upper air data which is what you're
25 talking about here?

1 MS. CHURNEY: Yes.

2 MR. RUBENSTEIN: No. The upper air data
3 were taken from Oakland. There is no upper air
4 monitoring location in San Jose.

5 Again, it's the difference between the
6 ground level meteorology, which in the case of the
7 San Jose project, were taken from a location a few
8 miles from the site. And in the case of this
9 project we're taking at the same location.

10 And the upper air data that you're
11 referring to from Vandenberg and in the San Jose
12 project case is from Oakland. As I said earlier,
13 the upper air data are very commonly taken from
14 longer distances away because that data does not
15 change very much, and because there are very few
16 sources of quality data in the state.

17 MS. CHURNEY: What are the worst case
18 conditions in your modeling for Morro Bay?

19 MR. RUBENSTEIN: There's a table in the
20 AFC, which is table 6.2-36, and it's located on
21 page 6.2-57, which summarizes the results of the
22 modeling analyses for different types of
23 meteorological conditions and plant operations.

24 With the exception of the one-hour
25 average carbon monoxide standard, the worst case

1 concentrations are all associated with the use of
2 ISC under various plant operating conditions.

3 I'd actually have to go into the model
4 outputs for each of the numbers that are presented
5 under the column labeled ISC to find out what
6 meteorological condition that was associated with.

7 So I can't answer that question off the
8 top of my head.

9 MS. CHURNEY: Do you know whether it
10 included downwash or fumigation effects?

11 MR. RUBENSTEIN: Since the highest
12 concentrations for the new plant are associated
13 with -- or are found on Morro Rock, and given the
14 distance from the plant to the Rock, I would have
15 to conclude that those are not downwash
16 conditions.

17 I know from looking at table 6.2-36 that
18 the worst case is not fumigation conditions,
19 because those are spelled out separately. The ISC
20 modeling results include both downwash conditions
21 and weather conditions where downwash does not
22 occur. The model does not distinguish in terms of
23 presenting its outputs.

24 MS. CHURNEY: Are downwash effects or
25 other ground level concentration impacts affected

1 by inversion layers or fog conditions?

2 MR. RUBENSTEIN: They are affected by
3 inversion layers; they are not affected by fog
4 conditions. But there may be a correlation
5 between fog and inversion levels.

6 MS. CHURNEY: Are fog conditions taken
7 into account in the modeling?

8 MR. RUBENSTEIN: The inversion height is
9 taken into account in the modeling, and as I
10 indicated, fog, itself, does not affect the
11 dispersion characteristics.

12 MS. CHURNEY: So fog was not taken into
13 account in the modeling?

14 MR. RUBENSTEIN: I'll say it again. Fog
15 does not affect the dispersion characteristics.
16 There is a correlation between inversion height
17 and fog, and inversion height is taken into
18 account in the calculations.

19 MS. CHURNEY: But specifically the
20 weather condition of fog was not --

21 MR. RUBENSTEIN: It doesn't need to be.
22 There are no models that predict air quality
23 concentrations as a function of foggy days or non
24 foggy days. There is no impact of fog on
25 dispersion.

1 MS. CHURNEY: Could I just get an answer
2 to the question?

3 MR. ELLISON: I think he provided it.

4 MS. CHURNEY: That wasn't taken into
5 account?

6 MR. RUBENSTEIN: The model included
7 analyses on foggy days.

8 MS. CHURNEY: Could you compare the old
9 and the new plants briefly in terms of your
10 modeling results as to the impacts of inversion
11 layers?

12 MR. RUBENSTEIN: Inversion layers affect
13 the dispersion characteristics of both the
14 existing stacks and the new stacks. They will
15 affect those stacks in different ways.

16 MS. CHURNEY: Well, what is the
17 difference, what are the different ways?

18 MR. RUBENSTEIN: During conditions when
19 the inversion height is below 145 feet, the plume
20 from both the existing stacks and the new stacks
21 would be above the inversion layer and would not
22 likely mix with ground level air and re-entrain
23 down to the ground anywhere near the plant.

24 If the plumes are above 145 feet --
25 excuse me, if the inversion height is above 145

1 feet, then whether the plumes are above or below
2 the inversion height will depend on the actual
3 meteorology during any particular hour, and what
4 the plant's operating characteristics are during
5 that hour.

6 I don't think I could give you any
7 further generalizations.

8 MS. CHURNEY: Will the existing plant's
9 emissions tend to be above inversion layers in
10 Morro Bay more often than with the new plant?

11 MR. RUBENSTEIN: I'd have to take a look
12 at some kind of a frequency distribution of
13 inversion height in order to be able to answer
14 that question competently.

15 MS. CHURNEY: Does either sunrise or
16 shoreline fumigation involve a situation where the
17 plume is trapped under an inversion layer?

18 MR. RUBENSTEIN: No, I'm not sure that
19 either of those conditions involve a physical
20 trapping of the plume. You can take a look, for
21 example, at the shoreline fumigation results in
22 table 6.2-36. The concentrations there are quite
23 a bit lower than the ISC model predicts for
24 maximum concentrations on Morro Rock.

25 And I would expect that if you actually

1 had a plume trapped under a low inversion brought
2 to the ground very quickly that you would have
3 concentrations much higher than that.

4 There's a description of both fumigation
5 and shoreline fumigation conditions in the AFC on
6 page 6.2-53. And there is an interrelationship
7 between the inversion height and these fumigation
8 effects, but I'm not sure that it's correct to
9 refer to that as trapping.

10 MS. CHURNEY: Does your model assume the
11 terrain is flat for purposes of modeling, or is
12 case conditions?

13 MR. RUBENSTEIN: No.

14 MS. CHURNEY: So it's taken into account
15 the topography of Morro Bay?

16 MR. RUBENSTEIN: That's correct.

17 MS. CHURNEY: Did Duke make any changes
18 in the modeling for either the new plant or the
19 existing plant from the time of the AFC filing and
20 the issuance of the APCD's FDOC?

21 MR. RUBENSTEIN: Duke didn't perform the
22 modeling. Our firm did. And the modeling
23 analysis was revised at the request of the Air
24 District with respect to the existing boilers,
25 which were originally modeled with a stack height

1 of 383 feet. And the revised model analysis was
2 based on the true stack height of 450 feet.

3 And I believe that was the only change
4 that was made to the dispersion modeling analyses
5 from the time the AFC was filed.

6 MS. CHURNEY: Were there any other
7 changes to the modeling?

8 MR. RUBENSTEIN: I just said I believe
9 that was the only change.

10 MS. CHURNEY: Looking at the 24-hour PM
11 modeling results, does the model say the highest
12 one-hour emissions will occur for 24 hours
13 continuously?

14 MR. RUBENSTEIN: I'm sorry, could you
15 repeat that question?

16 MS. CHURNEY: Sure. If you look at the
17 24-hour PM modeling results, does that model
18 assume the highest one-hour emissions will occur
19 for 24 hours continuously?

20 MR. RUBENSTEIN: Does that assume the
21 highest emission will occur or the highest
22 concentration will occur?

23 MS. CHURNEY: I'm sorry, the highest
24 one-hour concentrations.

25 MR. RUBENSTEIN: No, the 24-hour average

1 is a true average of 24 hourly values.

2 MS. CHURNEY: Does the ISC model assume
3 that at some level of inversion layer the plume
4 will burst through the inversion layer?

5 MR. RUBENSTEIN: Under some conditions,
6 yes.

7 MS. CHURNEY: And what level is that?

8 MR. RUBENSTEIN: It depends on the
9 inversion level, I'm not sure I understand the
10 question. There is no set number above which the
11 plume is assumed to penetrate the inversion. The
12 inversion layer, for purposes of these analyses,
13 fluctuated based on the data taken from the
14 Vandenberg site.

15 And the model calculates when it
16 believes the plume would penetrate the inversion
17 based on the stack characteristics during that
18 hour, the inversion height during that hour, and
19 other meteorological conditions during that hour.

20 MS. CHURNEY: Does this assumption
21 differ with load levels, for example, 70 percent
22 or 100 percent load with or without duct firing?

23 MR. RUBENSTEIN: I'm sorry, does what
24 assumption vary?

25 MS. CHURNEY: The assumption of the

1 model, the level of the plume bursting through the
2 inversion layer.

3 MR. RUBENSTEIN: The model doesn't know
4 what the load level is from the units. We input
5 to the model stack characteristics which do vary
6 with load, and whether the unit is being duct
7 fired or not.

8 We performed a sensitivity analysis that
9 is included in the AFC at table 6.2-2.2, and
10 that's in the air quality appendix. And that
11 table helped us to identify what was the worst
12 case operating condition in terms of ambient
13 temperature and turbine load and whether duct
14 firing was operational or not.

15 The answer varies depending on the
16 pollutant and averaging period. And based on that
17 matrix of numbers in the table, we selected the
18 worst case operating modes for each pollutant and
19 averaging period.

20 And those operating modes were then used
21 as the basis for the remainder of the modeling.

22 So, as I said, to sum up, the ISC model
23 didn't make any judgments about what happened in
24 terms of the plume penetrating the inversion layer
25 based on different engine modes. We used the

1 screening analysis that we prepared to determine
2 what the worst case would be for each pollutant
3 and condition, then carry that through the rest of
4 the analysis.

5 MS. CHURNEY: And just focusing on PM
6 for the moment, in what circumstances would the
7 worst impacts not occur with duct firing in
8 operation?

9 MR. RUBENSTEIN: The screening analysis
10 indicated that the maximum 24-hour average PM10
11 concentrations occurred at a turbine load of 100
12 percent and an ambient temperature of 85 degrees
13 Fahrenheit with duct firing.

14 And the annual average PM10
15 concentrations, the worst case occurred when the
16 engine was at 50 percent load with an 85 degree
17 ambient temperature and no duct firing.

18 So the answer is different depending
19 again on the pollutant and the averaging period.

20 MS. CHURNEY: Three pollutants go up
21 significantly during startup compared to normal
22 operations, is that correct?

23 MR. RUBENSTEIN: That's correct.
24 Hydrocarbons, carbon monoxide and oxides of
25 nitrogen.

1 MS. CHURNEY: And these have separate
2 permitted emission limits in the FDOC and FSA, is
3 that correct, as well?

4 MR. RUBENSTEIN: You mean separate
5 emission limits during startups?

6 MS. CHURNEY: Correct.

7 MR. RUBENSTEIN: I believe that's
8 correct; let me just double check that to be
9 certain.

10 Yes, that's correct.

11 MS. CHURNEY: What was the condition
12 used for these pollutants in the modeling, or
13 assumed for these pollutants in the modeling? For
14 example, two turbines in startup and two at 100
15 percent?

16 MR. RUBENSTEIN: That information is in
17 the AFC on page 6.2-54. The stack parameters that
18 we used were based on a 50 percent operating load,
19 but the emission rates were higher values that are
20 presented in table 6.2-34, and those are
21 consistent with the numbers included in the FDOC.

22 MS. CHURNEY: And to follow up on the
23 startup modeling of the NOx, CO and volatile
24 organic compounds, when did the model assume these
25 startups would occur?

1 MR. RUBENSTEIN: We should clarify, we
2 did not do any modeling of the VOC or hydrocarbon
3 emissions. That pollutant is not modeled because
4 there is no air quality standard for VOC directly.
5 So the startup modeling just looked at CO and NOx,
6 and actually we looked at SO2, as well, as a
7 potential worst case, even though the emission
8 rates were not elevated during startup.

9 The plant startup was simulated as if it
10 occurred for each hour of the year, and
11 consequently there wasn't any specific hour in
12 which we made an assumption about when a startup
13 would occur.

14 The model identified the highest
15 concentrations for any hour because, of course, we
16 can't predict when the turbine might start. So we
17 had to look at the worst case.

18 MS. CHURNEY: How long would the effects
19 of seriatim startup emissions accumulate and be
20 recirculated in Morro Bay, at the worst case
21 location?

22 MR. RUBENSTEIN: Could you explain what
23 you mean by seriatim startup? I'm not familiar
24 with that term.

25 MS. SODERBECK: I think last week during

1 HAZMAT Duke witnesses testified that most likely
2 the startups for the turbine would be one after
3 another, and not occurring at the same time.

4 And so I guess the question is if that's
5 the case, and these things do have some cumulative
6 effect, do you have any idea what the result is
7 from starting one turbine, then starting another,
8 and then starting a third, et cetera?

9 MR. RUBENSTEIN: First of all, I don't
10 believe there's anything to indicate that there's
11 any kind of a cumulative effect. And we assumed,
12 as a worst case, that two turbines would start up
13 at the same time.

14 If, in fact, turbine startups were
15 spread out so that only one turbine would be
16 starting up at a time, then the concentrations
17 would be lower than what we predicted.

18 MS. CHURNEY: Do you agree with staff's
19 assessment in appendix A of the public health
20 section FSA part one, that fine particles in
21 general remain in circulation much longer than
22 coarse particles, and generally come out of
23 circulation with rainfall?

24 MR. RUBENSTEIN: I need to get that
25 statement in front of me, just a moment, please.

1 MS. SODERBECK: That's page 3.4-17 in
2 the FSA. And that's in the right smack in the
3 center paragraph of the page.

4 MR. RUBENSTEIN: I'm resisting getting
5 out my laptop where I have this, so I'm going to
6 try and keep working with paper here tonight.

7 I'm sorry, Pam, what page number was
8 that again?

9 MS. SODERBECK: It's 3.4-17 and it's the
10 last couple sentences of the middle paragraph that
11 starts off: PM2.5.

12 MR. RUBENSTEIN: That large paragraph
13 that starts PM2.5 is derived directly? Is that
14 what you were referring to?

15 MS. SODERBECK: Yes.

16 MR. RUBENSTEIN: Yes, I agree with the
17 statements in that paragraph.

18 MS. CHURNEY: Will PM emissions increase
19 over time as the turbines age?

20 MR. RUBENSTEIN: I don't believe that
21 there's sufficient data to answer that question
22 with precision. However, I'm certain that to the
23 extent that there is any increase in PM10
24 emissions over time, the levels will remain well
25 below the worst case levels that we've assumed in

1 our analysis.

2 The only mechanisms that I'm aware of
3 that could result in an increase in PM10 emissions
4 over time is actually a decrease in turbine
5 efficiency, which requires more fuel consumption.

6 HEARING OFFICER FAY: Let's go off the
7 record a moment.

8 (Off the record.)

9 HEARING OFFICER FAY: Okay, we're going
10 to conclude for this evening. And we will resume
11 at 9:00 a.m. tomorrow morning right here with the
12 Coastal Alliance's cross-examination of the
13 applicant's witnesses on air quality and public
14 health.

15 (Whereupon, at 8:17 p.m., the hearing
16 was adjourned, to reconvene at 9:00
17 a.m., Wednesday, February 6, 2002, at
18 this same location.)

19 --o0o--

20

21

22

23

24

25

CERTIFICATE OF REPORTER

I, JAMES RAMOS, an Electronic Reporter,
do hereby certify that I am a disinterested person
herein; that I recorded the foregoing California
Energy Commission Hearing; that it was thereafter
transcribed into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
hearing, nor in any way interested in outcome of
said hearing.

IN WITNESS WHEREOF, I have hereunto set
my hand this 11th day of February, 2002.

JAMES RAMOS

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

□